In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-605

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, Mississippi Power & Light Company (MP&L) prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 553 F.2d 480 (5th Cir. 1977) and is reprinted in Appendix A. With the exception of one issue not raised here, the court of appeals disposed of MP&L's appeal in the opinion on the companion case, *United States* v. *New Orleans Public Service, Inc.* (hereinafter cited as *NOPSI* and reprinted in Appendix B) 553 F.2d 459 (5th Cir. 1977), *petition for cert. filed* (Sept. 30, 1977) (No. 77-497). The district court's opinion is unofficially reported at 10 F.E.P. 1084 (S.D. Miss. 1975), and is reprinted in Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1977. A timely petition for rehearing was denied on August 17, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The broad issue is whether the executive branch of the government can, without express congressional authorization, unilaterally force upon a nonconsenting contractor the contractual terms of Executive Order 11246.

To resolve this issue, the following questions are presented:

I. THE VALIDITY OF EXECUTIVE ORDER 11246

A. Statutory Authority

1. Whether Executive Order 11246 is related to the purposes of the Federal Property and Administrative Services Act, within the meaning of *NAACP* v. *FPC*, 425 U.S. 662 (1976).

2. Whether Congress impliedly ratified Executive Order 11246 in passing the 1964 Civil Rights Act.

B. Enforcement Powers

Assuming arguendo that the Executive Order is authorized by the FPASA or was subsequently ratified by the Civil Rights Act, whether the President can create enforcement powers not authorized by the statute, to-wit: (1) mandatory access to corporate books, records, and premises,

(2) sanctions and penalties, and (3) suits for judicial injunctions.

C. Searches and Seizures

Whether the executive branch can, without congressional authorization, subpoena books and records and enter and inspect private property consistent with the Fourth Amendment.

II. THE VALIDITY OF 41 C.F.R. § 60-1.4(e) WHICH IMPOSES EXECUTIVE ORDER 11246 ON NONCONSENTING CONTRACTORS.

A. Whether the Secretary of Labor exceeded his authority in issuing a regulation which abrogates a common law contract principle by incorporating a term without consent into all contracts which do not physically contain it.

B. Whether the Secretary of Labor, in impairing the obligation of a government contract by issuing the above regulation which increases the liabilities thereunder, exceeded the authority delegated to him.

CONSTITUTIONAL PROVISIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Executive Order 11246 (See Appendix D):

> 30 Fed. Reg. 12319 (1965), 3 C.F.R. 339 (1964-65 Compilation), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), 3 C.F.R. 406 (1969), 42 U.S.C.A. § 2000e note (1974), superseded in part (irrelevant for purposes herein) by Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), 3 C.F.R. 133 (1969 Compilation), 42 U.S.C.A. § 2000e note (1974)

Pertinent regulations of the Secretary of Labor implementing Executive Order 11246, reprinted in full in Appendix E, to-wit:

> 41 C.F.R. § 60-1.4(e), *Incorporation by operation of the Order.* By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

> 41 C.F.R. § 60-1.43, *Access to records of employment.* Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the order and the rules and regulations pursuant thereto by the agency, or the Director. Information obtained in this matter shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act.

The pertinent provisions of the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, 40 U.S.C. § 471 *et seq.*, reprinted in Appendix F.

STATEMENT OF THE CASE

1. Background Facts

This case reflects the increasing practice of regulating employment practices and wages of government contractors and subcontractors by requiring prescribed contractual stipulations.[1] Except for the Executive Order challenged here, all of those stipulations have been required by Congress. The power of Congress to do so is not questioned

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1. These stipulations include such requirements as paying prescribed minimum wages (Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*; the Service Contract Act, 41 U.S.C. § 351 *et seq.*) taking affirmative action to employ handicapped persons (1973 Rehabilitation Act, 29 U.S.C. § 793) and affirmative action to employ disabled veterans and Vietnam era veterans (1974 Vietnam Era Veterans Assistance Act, 38 U.S.C. § 2012).

here.[2] The stipulations required by Executive Order 11246 are unprecedented because they are prescribed by the President with no express congressional authorization.

On September 24, 1965, President Johnson signed Executive Order 11246 in which he instructed "all Government contracting agencies [to] include in every Government contract hereafter entered into" a prescribed contractual stipulation in which the contractor agrees *inter alia* not to discriminate on the basis of race, color, religion, or national origin, agrees to take affirmative action to employ minorities and agrees to obey all regulations of the Secretary of Labor.[3] This stipulation is commonly called the equal opportunity clause. The order delegates to the Secretary of Labor the responsibility for administering the Executive Order and the power to write implementing rules and regulations.

For many years, MP&L has furnished electrical service to various facilities operated by the General Services Administration under written and unwritten agreements. None of these agreements contain the equal opportunity clause. The government has never requested that it be included. Regardless of the presence or lack thereof of the equal opportunity clause, the government has maintained that MP&L is nevertheless bound by the Executive Order by virtue of 41 C.F.R. § 60-1.4(e) which states

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2. When the Walsh-Healey Public Contracts Act was challenged, this Court held that *Congress* (like private individuals and businesses) enjoys the unrestricted power to fix the terms and conditions upon which it will make needed purchases. Perkins v. Lukens Steel Co., 310 U.S. 1133 (1940). That case does not stand for the proposition that the *executive* has concurrent power to fix the terms and conditions upon which the government will make its contracts. Contractors Association v. Secretary, 442 F.2d 159 (3rd Cir. 1971).

3. This lengthy stipulation is set forth in § 202 of the Executive Order. Sex was added as a proscribed basis of discrimination by Executive Order 11375, 32 Fed. Reg. 14303 (1967).

that "the equal opportunity clause shall be considered to be a part of every contract and subcontract . . . whether or not it is physically included in such contract and whether or not the contract . . . is written."

Pursuant to this regulation, agents of the GSA attempted on March 28, 1972, to schedule an on-site compliance review. MP&L declined on the ground that it is not subject to the Executive Order because it has never agreed to it. The GSA then referred this matter to the Justice Department.

2. Proceedings in the District Court

On August 8, 1974, the Justice Department filed suit in the Southern District of Mississippi seeking to "enforce the contractual obligations imposed by Executive Order 11246." Complaint ¶1. The government's alleged basis of jurisdiction was 28 U.S.C. § 1345 which provides that:

> [T]he district courts shall have original jurisdiction of all civil actions . . . commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

MP&L argued below and here that while that statute may confer jurisdiction, it does not authorize the suit. On April 22, 1975, the district court granted the government's motion for partial summary judgment and held that MP&L is subject to the Executive Order in all respects. The court issued an order enjoining MP&L from refusing to comply with the Executive Order and all applicable rules and regulations (Appendix C). In view of the constitutional issues involved and pursuant to a motion filed by MP&L, the district court issued a stay of its injunction pending appeal.

3. Proceedings in the Court of Appeals

For oral argument this case was consolidated with *United States* v. *New Orleans Public Service, Inc., supra* (*NOPSI*) (Appendix B), which involved very similar facts and issues. Although separate opinions were written, the *NOPSI* opinion disposed of all the issues save one raised by MP&L below. While the court of appeals affirmed the opinion of the district court, it vacated the injunction issued therein, dismissed the case and remanded it to the GSA for administrative enforcement proceedings. The court explained that:

> [F]undamental fairness requires that the Government, armed this time with this court's opinion, now obtain the company's voluntary compliance before calling for the support of our injunctive powers.

NOPSI at 474. Circuit Judge Ainsworth wrote the majority opinion, joined by District Judge Hughes with Circuit Judge Clark dissenting.

SUMMARY OF ARGUMENTS

The court of appeals held that the Executive Order was authorized by the 1949 Federal Property and Administrative Services Act (FPASA) and was also ratified by Congress in passing the 1964 Civil Rights Act. The obvious purpose of the Executive Order is to eliminate employment discrimination by government contractors. The FPASA does not expressly authorize the Executive Order. Further, under the holding of *NAACP* v. *FPC*, 425 U.S. 662 (1976), the consequences of employment discrimination are not related to any of the purposes of the Act. Since the Executive Order is not reasonably related to any of the purposes of the Act, it cannot be authorized by it.

Mourning v. *Family Publications Service*, 411 U.S. 356 (1973).

Nor did Congress subsequently ratify Executive Order 11246 in passing the 1964 Civil Rights Act. In fact, Congress withheld ratification of the Executive Order.

Even if the Executive Order was generally authorized or subsequently ratified by Congress, there is still no statutory authority for the enforcement powers exercised by the executive under the Executive Order. Under the Executive Order, the President attempts to exercise (1) the right of mandatory access to corporate books, records, and premises, (2) the authority to create and impose sanctions and penalties for violations of the Executive Order, and (3) the authority to sue in federal court and invoke the injunctive powers of the federal courts.

Administrative agencies and administrators acting under a delegation of authority from Congress do not have plenary powers but only those powers delegated by Congress. *Stark* v. *Wickard*, 321 U.S. 288 (1944). The creation of each of these powers is fundamentally lawmaking because it involves the creation of unauthorized enforcement powers. Since the power of an administrator to write implementing rules and regulations or Executive Orders is not the power to make law but the power to carry into effect the will of Congress, an administrator cannot create enforcement powers which Congress has not authorized.

The executive's alleged enforcement power of mandatory access to corporate books, records, and accounts is also an unreasonable search and seizure and, therefore, a violation of the Fourth Amendment. Administrative subpoenas of corporate books and records violate the Fourth Amendment unless specifically authorized by Congress. *See* v. *Seattle*, 387 U.S. 541 (1967). Further, administra-

tive entry and inspection of private property violates the Fourth Amendment unless specifically authorized by Congress. *Camara* v. *Municipal Court*, 387 U.S. 523.

The Executive Order is silent with respect to contracts which do not contain the equal opportunity clause. The Secretary of Labor wrote an implementing regulation which states that the Executive Order "shall be considered to be a part of every contract . . . whether or not it is physically included in such contract". This regulation, which unilaterally imposes on nonconsenting contractors the terms of the Executive Order, is invalid for two reasons.

First, it abrogates the principle of the common law of contracts that a party to a contract is not bound by any term to which he does not agree. This principle is applicable to MP&L's government contracts because this Court has held that government contracts are to be construed by the same principles of common law as if the contract were between private parties. *Priebe & Sons* v. *United States*, 332 U.S. 407 (1947); *Reading Steel Casting Co.* v. *United States*, 268 U.S. 186 (1925). Since this court has held that the government is bound by the common law of contracts unless Congress exercises its legislative power to the contrary, the Secretary cannot exercise such power by writing a regulation. Since this regulation changes the law under which the government is bound, it in effect makes substantive law. The power of an administrator to write a regulation is not the power to make law. *Manhattan General Equipment* v. *Commissioner*, 297 U.S. 129 (1936).

Secondly, since the regulation alters the substantive terms of MP&L's government contract, it violates MP&L's Fifth Amendment rights by impairing the obligations of the contract. "Rights against the United States arising out

of contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). "Legislation [or regulations] which . . . add new duties or obligations [to a contract] necessarily impairs the obligation of the contract." *Northern Pacific RR. Co.* v. *Minnesota*, 208 U.S. 583, 591 (1908). Since the regulation imposes additional obligations on unconsenting contractors, the obligations of the contract are thus impaired. While on limited occasions Congress can impair the obligations of government contracts, cf. *United States Trust Co.* v. *New Jersey*, 45 U.S.L.W. 4418 (U.S. April 27, 1977), it nevertheless takes a specific Act of Congress. Since this regulation impairs a government contract which this Court has said only Congress can do, it makes substantive law and violates MP&L's Fifth Amendment rights and is, therefore, void.

WHY THE PETITION SHOULD BE GRANTED

I.

The Validity of Executive Order 11246 in General

A. Statutory Authority

1. The Executive Order is not related to the purposes of the Federal Property and Administrative Services Act within the meaning of *NAACP* v. *FPC*, supra, and therefore is unauthorized.

As noted *supra*, Executive Order 11246 instructs government agencies to insert the equal opportunity clause into government contracts and subcontracts. President Johnson cited no statutory authority in issuing the Executive Order, but the court of appeals as well as several other courts have subsequently held that the President

acted within the power delegated by Congress in § 205(a) of the 1949 Federal Property and Administrative Services Act (FPASA), 40 U.S.C. § 471 *et seq.*, 63 Stat. 377, which provides that:

> The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate provisions of this Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

The test of whether the Executive Order implements the FPASA is well developed.

> Where . . . a statute states simply that the agency may make . . . such rules and regulations as may be necessary to carry out the provisions of this act. [The test of] validity of a regulation promulgated thereunder [is whether] it is reasonably related to the purposes of the enabling legislation.

Mourning v. *Family Publications Service*, 411 U.S. 356, 369 (1973). The obvious purpose of the Executive Order is to eliminate employment discrimination among government contractors and subcontractors. If that purpose is reasonably related to the purposes of the FPASA, it is within the scope of the authority delegated.

This Court recently squared with the similar question of whether the Federal Power Commission has statutory authority to write regulations prohibiting employment discrimination among its regulatees. *NAACP* v. *FPC*, 425 U.S. 662 (1976). The FPC had held that it had no authority to write any regulations dealing with employment discrimination. This Court noted that while Congress had not expressly delegated such power to the FPC, Congress

did charge it with the duty of establishing just and reasonable utility rates. Therefore, the FPC

> is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees *only* insofar as such consequences are *directly* related to the Commission's establishment of just and reasonable rates.

Id. at 671 (emphasis added).

Since the FPASA does not expressly authorize regulations on discriminatory employment practices, *NAACP* v. *FPC* requires a review of the FPASA and its purposes to determine whether they are related to the "consequences" of employment discrimination. The court of appeals did not look to the statute or to its legislative history but rather chose to rely on its earlier decision in *Farkus* v. *Texas Instruments*, 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967), and the Third Circuit's decision in *Contractors Association* v. *Secretary*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied*, 404 U.S. 854 (1971), in summarily holding that the FPASA authorizes the Executive Order.

Perhaps the court of appeals was reluctant to review the Executive Order under the principles set forth in *NAACP* v. *FPC* out of a genuine policy concern to uphold a civil rights program. That is not the issue. As this Court distinguished:

> The question presented is not whether the elimination of discrimination from our society is an important national goal. It clearly is. The question is not whether Congress could authorize the [President] to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the [President] such authority.

NAACP v. *FPC*, *supra* at 665.

Under the guidance of *FPC*, the focal point is whether the consequences of employment discrimination are *directly* related to any of the purposes of the FPASA. The purpose of that statute was to consolidate the procurement function of the many federal agencies into a single one with uniform procedures. Title I (Organization) created the General Services Administration (GSA) and transferred the functions of existing agencies to it. Title II (Property Management) gives the GSA the power to regulate the government's purchase, utilization, storage and disposal of property. Title IV (Foreign Access Property) regulates disposal of government property in foreign countries. Title V contains general provisions. These titles had the sole function of reorganizing and consolidating the government's fragmented system of procurement.

In Title III (Procurement Procedure) Congress did seek to specify certain procurement policies. Congress (1) provided for advertising of most contracts, (2) required that negotiated contracts contain a warranty against contingent fees, (3) proscribed a cost plus a percentage of the cost system of contracting and (4) declared that a fair portion of government contracts be placed with small business concerns.

The statute makes clear that the consequences of discriminatory employment practices are not related directly or indirectly to any of the purposes enumerated in the Act.

This Court mandated a *direct relationship* between the consequences of employment discrimination and the agency's (or administrator's) statutory functions. Therefore, the court of appeals erred in holding that *FPC* "require[s] only a *loose relationship* between the noneconomic objective, *i.e.*, regulating employment discrimination,

and the procurement function." *NOPSI* at 468 n.8 (emphasis added).

Thus applying the correct standard of a *direct relationship*, it is clear that Executive Order 11246 is not related to the statute which ostensibly authorizes it and is therefore unauthorized.

In view of *FPC*, the court of appeals' reliance on its *Farkus* case and the Third Circuit's *Contractors Association* case resulted in the application of erroneous legal principles. While not linking the Executive Order to the purposes of the FPASA, the *Contractors Association* court did rationalize that it is in the interest of the government to eliminate racial discrimination because discrimination inflates labor costs and thereby increases procurement costs.[4] Assuming that discriminatory practices do increase labor costs, which are passed on to the government in the form of higher procurement costs, a reduction in the costs of goods and services was not one of the purposes of Congress in passing the FPASA.

The legislative history makes it abundantly clear that Congress was rather concerned about the cost caused by

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4. In Contractors Association, the Third Circuit seemed to imply that discriminatory employment practices increased the labor costs and thus the cost of government contracts.

> [I]t is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen.

supra at 170. In Farkus, the Fifth Circuit seemed to say the same thing.

> We would be hesitant to say that the antidiscrimination provisions of Executive Order 10925 are so unrelated to the establishment of "an economical and efficient system for * * * the procurement and supply of property and services, 40 U.S.C.A. § 471, that the order should be treated as issued without statutory authority.

supra at 632 n.1.

a fragmented and inefficient procurement system in which each agency did its own procurement.

> The bill provides generally for uniform policies and methods of procurement supply and related functions. . . . It is felt in this way great savings can be achieved by the government through the *elimination of competition among executive agencies* for like articles in the same markets, unnecessary purchasing, lack of quantities, supplies and other inefficiencies.
>
> The committee feels strongly that the economies and increased efficiencies resulting directly from *consolidation of agencies* are and should be only a beginning in the savings which will accrue to the federal treasury under the bill. Many millions more can be and must be pared from expenditures from property management through merger of common services and the resultant *reduction of overhead* and *elimination of duplicative services*. Efficient administration of well drawn programs based on careful studies can provide maximum economies in government.

H.R. Rep. No. 670, 81st Cong., 1st Sess. (1949) (emphasis added).

The legislative history shows that even under the Third Circuit's (supply and demand) theory of labor costs, the Executive Order is not directly related to any of the purposes of the Act. Reliance on *Contractors Association* was erroneous because as in *FPC*, "nothing in the Acts or the legislative histories . . . indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation," or that the consequences of such discrimination is in any way related to any of the purposes of the Act. *FPC*, *supra* at 670. Therefore, the President exceeded the

powers delegated by § 486(a), and the Executive Order is unauthorized.

2. Congress did not impliedly ratify the Executive Order in passing the 1964 Civil Rights Act.

The court of appeals also cited Title VII of the 1964 Civil Rights Act, 78 Stat. 241 (1964) as amended by 86 Stat. 103 (1972) 42 U.S.C. §§ 2000e *et seq.*, as authority for the Executive Order. "A reference in the Act, as originally enacted, *id.* § 2000e-8(d), to the Executive Order program indicated congressional intent that the program would continue in existence." *NOPSI* at 467. That section provided that employers required to file reports under (President Kennedy's) Executive Order 10925 (the predecessor to 11246) would not have to file reports with the Equal Employment Opportunity Commission. That reference is a misleading indication of Congress's treatment of the Executive Order. In fact, in considering the civil rights bill, Congress specifically refused to ratify it.

When President Kennedy sent his civil rights message to Congress on June 19, 1963, with a bill that eventually became the Civil Rights Act of 1964, he specifically requested that the committee he had set up under Executive Order 10925 "be given a permanent statutory basis." H.R. Doc. No. 124, 88th Cong., 1st Sess. (1963).[5] The bill,

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5. Interestingly, the bill that President Kennedy sent to Congress did not cover employers generally. It only covered government contractors and subcontractors. Further, the bill did not provide for enforcement by an independent agency but by the President himself. Section 701 of the bill provided that

> The President is authorized to establish a Commission . . . to prevent discrimination against employees or applicants . . . by Government contractors and subcontractors. . . . The Commission shall have such powers to effectuate the purposes of this Title as may be conferred upon it by the President.

H.R. Doc. No. 124, 88th Cong., 1st Sess. 24 (1963).

as reported out of committee, created the Equal Employment Opportunity Commission to enforce the act instead of granting enforcement powers to the President's committee. Nevertheless, a provision giving statutory authority to the Executive Order was retained in the bill sent to the House floor.

> Section 711(b) provided:
>
> The President is authorized to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States.

H.R. 7152, 88th Cong., 2nd Sess. (1963). This provision was recognized in the committee report[6] and on the House floor[7] as giving statutory authority to Executive Order 10925.

When put to a vote by the entire House, the provision was deleted entirely. 110 Cong. Rec. 2575 (February 8, 1964). The debate revealed that "[m]any [house members] felt § 711 to be a highly dangerous section of the bill and accordingly much of [the] debate [was] predicated upon the fact that this language should be removed." *Id.* However, while withholding ratification, the debate also showed that the House did not intend for its action to affect Executive Order 10925 by way either of ratification or repeal.

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6. H.R. Report No. 914, 88th Cong., 1st Sess. (1963), U.S. Code Cong. Adm. News, 88th Cong., 2nd Sess. 2412 (1963).

7. In making a section-by-section analysis of the committee bill on the House floor, Congressman Ryan "point[ed] out that Title VII provides a statutory basis for the President's Committee on Equal Opportunity to insure nondiscrimination . . . on contracts with federal agencies." 110 Cong. Rec. 1643 (Feb. 1, 1964).

> [T]he deletion of the language by the amendment [did] not have any effect upon existing presidential power. . . . [It did] not limit it and it [did] not broaden it. It remain[ed] intact as it [was then].

Id. The floor managers on the Senate side also acknowledged that Title VII as passed by the House did not affect Executive Order 10925.[8]

So, while Congress did not intend to supercede or nullify Executive Order 10925, and in fact took it into consideration in coordinating reporting requirements under the Civil Rights Act, it nevertheless withheld congressional ratification in unmistakable terms. Therefore, the court of appeals holding that a mere reference to the predecessor of Executive Order 11246 in a minor section of 1964 Civil Rights Act was implied congressional ratification is contrary to the legislative history of the Act. As Justice Frankfurter said in the "Steel Seizure" case, "to draw implied approval . . . from this history is to make something out of nothing."[9]

B. Enforcement Powers

Assuming *arguendo* that the Executive Order is authorized by the FPASA or was subsequently ratified by the Civil Rights Act, the President cannot create

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8. The *Interpretive Memorandum* of Senators Clark and Case (floor managers of the Senate bill) states:

> The President's committee on equal employment opportunity was created by Executive Order 10925 . . . Title VII in its present form has no effect on the responsibilities of the committee or the authority possessed by the President or federal agencies under existing law to deal with racial discrimination in the area of federal government, employment and federal contracts.

110 Cong. Rec. 7213 (1964).

9. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 608-09 (1952) (concurring opinion).

enforcement powers not authorized by the statute, to wit: (1) mandatory access to corporate books, records and premises, (2) sanctions and penalties and (3) suits for judicial injunctions.

The FPASA delegated to the President only the power to issue policies and directives, but the President has exercised much more power.

Since the statute did not provide for compulsory process to investigate violations of the Act and implementing executive orders, the President simply created his own. Section 202(5) of the Executive Order provides that contractors "will permit access to its books, records and accounts." Implementing regulation, 41 C.F.R. § 60-1.43, further provides that contractors will permit access to their premises.

Since the statute did not provide for sanctions and penalties for said violations, the President simply created his own. Section 209(a) of the Executive Order provides *inter alia* that contractors can have their contracts terminated and can be debarred from future constracts for violations.[10] To supplement these remedies, the Secretary of Labor has recently conferred upon himself cease and desist authority.[11]

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10. While these remedies are provided for violations of other statutes governing government contracts, they were expressly created by Congress. *See,* 40 U.S.C.A. §§ 276a-1 and 2; 41 U.S. C.A. §§ 36 and 354.

11. The Secretary amended the regulations (42 Fed. Reg. 3454, Feb. 17, 1977) to provide that

> [T]he compliance agency (with the prior approval of the Director), or OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include affected class and back pay relief), and to impose administrative sanctions, or any of the above.

41 C.F.R. § 60-1.26(a)(2)

(Continued on following page)

Since the statute did not authorize suits to enjoin said violation, the President simply created his own cause of action by authorizing such suits himself. Section 209(a)(2) provides that the Department of Justice shall bring "appropriate proceedings . . . to enforce [the Executive Order and implementing regulations] including the enjoining . . . of [persons who] seek to prevent . . . compliance with the . . . Order."[12] The Secretary of Labor bolstered this remedy by authorizing not only injunctions against violations but also any other equitable relief including back pay.[13]

The exercise of these powers without congressional authorization is unprecedented. This case raises the simple question of whether the President or any executive agency can exercise these powers without express congressional authorization. Since it has never before been attempted, there

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Footnote continued—

> If it is determined after a hearing . . . that the contractor is violating the Order or regulations issued thereunder, the compliance agency . . . or the Secretary . . . shall issue an Administrative Order enjoining the violations and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above.

41 C.F.R. § 60-1.26(d)

12. While the government has sued some contractors for violating the Executive Order, they had agreed to it as a part of their contract. *See e.g.,* United States v. Local 189, Papermakers and Paperworkers, 282 F. Supp. 39 (E.D. La. 1968), *aff'd,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). The cause of action was one for common law breach of contract, which this court has held to be actionable by the government without congressional authorization. Rex Trailer Company v. United States, 350 U.S. 148 (1956).

13. Implementing regulation 41 C.F.R. § 60-1.26(e) provides:

> [T]he Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

is no case law directly on point. Nevertheless, these plenary powers are alien to our system of administrative law. Administrators and executive agencies being creatures of statute have no inherent substantive power, only the power delegated by Congress. "[T]he power of [administrators and agencies] is circumscribed by the authority granted." *Stark* v. *Wickard*, 321 U.S. 288, 309 (1944).

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation [which makes law] is a mere nullity.

Dixon v. *United States*, 381 U.S. 68, 74 (1965), quoting *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129 (1936). The promulgation by executive order and regulation of each enforcement power enumerated above is fundamentally lawmaking because the executive and administrator themselves rather than Congress created the investigatory powers, the penalties and sanctions and the cause of action to sue and invoke the injunctive powers of the federal courts.

Did not the President make law when he created by regulation compulsory process to investigate violations? Administrative agencies do not have compulsory process or subpoena power without specific authorization from Congress. *See* v. *Seattle*, 387 U.S. 541 (1967).

Did not the President make law when he created by regulation penalties and sanctions?[14] This Court has held that while administrators can be delegated the responsibility to impose penalties and sanctions, the penalties and sanctions themselves must be created by Congress. *United States* v. *Hark*, 320 U.S. 531 (1944); *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911).

14. The Administrative Procedure Act provides that a "sanction may not be imposed . . . except within the jurisdiction delegated to the agency and as authorized by law." 5 U.S.C. § 558(b).

Did not the President make law when he authorized by regulation suits to enjoin violations of his own order? Never before in the history of American jurisprudence has the government ever sued without congressional authorization to enforce any Executive Order,[15] regulation, or statute.

When the President or any administrator assumes the power to do any of the above, he is doing more than implementing what Congress has written. He is making law and exceeding the grant of authority delegated to him. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

C. Unreasonable Searches and Seizures

The executive's investigatory authority under the Executive Order for mandatory access to books and records (subpoena power) and to enter and inspect private property without congressional authorization is an unreasonable search and seizure and violates the Fourth Amendment.

1. Administrative Subpoena

As a tool to investigate violations of the Executive Order, § 202(5) provides that:

> [T]he contractor . . . will permit access to his books, records, and accounts by the contracting agency and

15. The court of appeals did not deal with the contention that the executive is powerless to create a cause of action and that this suit was not authorized by Congress.

> the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders.

While not called a subpoena power, this regulation which authorizes a right to inspect and copy provides the same function and is therefore subject to the restraints and protections provided by the Fourth Amendment. *Federal Trade Comm.* v. *American Tobacco Co.*, 264 U.S. 298 (1924). No statute authorizes this search. With congressional authorization, the search is patently unconstitutional.

> It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be . . . contemplated by statute.

See v. *Seattle*, 387 U.S. 541, 544 (1967). While this Court has not faced the precise issue here (because the executive branch has never subpoenaed books and records without congressional authorization), this Court has reiterated many times that the power of administrative agencies to subpoena corporate documents must be authorized by statute. *See United States* v. *Morton Salt Co.*, 383 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *Hale* v. *Henkel*, 201 U.S. 43 (1906).

The court of appeals did recognize that "the legality of the search depends . . . on the authority of a valid statute." *NOPSI* at 471. Having initially (and correctly) stated the law, the court of appeals then failed to apply it. It held that

> The argument about lack of statutory authorization is without merit in light of the pattern of congressional approval for the Executive Order program.[16]

16. NOPSI at 472 n.12.

> [Since] the Executive Order and its implementing regulations have the force and effect of law, . . . they play the same validating role as a statute.[17]

This Court has always required specific congressional authorization.[18] The court of appeals has eviscerated this Fourth Amendment protection by submitting tenuous and questionable implied congressional approval of a general program for specific authorization to issue subpoenas and search corporate records. The practical effect of the court of appeals' decision is that it gives an administrator who has rule-making power the additional power to write regulation giving himself subpoena power. If that result is not reversed, the cornerstone of the reasonableness of an administrative subpoena, i.e., congressional authorization, and the protection it affords, will be lost.

2. Administrative Entry and Inspection of Private Property

As an additional investigative tool, the Secretary of Labor has required by regulation that contractors and subcontractors "shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews."

In holding that the government can compel an on-site inspection of MP&L's premises, the court of appeals again did violence to several Supreme Court precedents.

> [A]dministrative entry, without consent, upon the portions of commercial premises which are not open

17. *Id.* at 471.

18. Other contractors who have agreed to the Executive Order may have waived their Fourth Amendment rights by expressly consenting as a part of the contract to the search, *see* Zap v. United States, 328 U.S. 624 (1946), on the theory that consent will validate an otherwise unconstitutional search. Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

> to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure.

See v. *Seattle*, 387 U.S. at 545.

> [O]ne governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonably (sic) unless it has been authorized by a valid search warrant.

Camara v. *Municipal Court*, 387 U.S. 523, 528-29 (1967).

Implicit in the Supreme Court's holding is that the inspection must be authorized by Congress. If not, the search is unreasonable per se under the Fourth Amendment.

Subsequent to *See* and *Camara*, the Supreme Court carved out limited exceptions to the above rule in holding that warrantless inspections could be made of liquor dealers and gun dealers.[19] *See Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) and *United States* v. *Biswell*, 406 U.S. 311 (1972), respectively. Relying on these cases the court of appeals held that the government could make an inspection of MP&L's premises. Those cases are inapposite (regardless of the warrant issue) *because those searches were specifically authorized by Congress*. This Court has *never* veered from this absolutely essential element of a "reasonable" (although sometimes

19. A similar case is also pending before this Court on the issue of whether warrantless administrative searches conducted by the Occupational Safety and Health Administration are reasonable under the Fourth Amendment *See* Barlow's, Inc. v. Marshall, *appeal docketed*, No. 76-1143, *probable jurisdiction noted* 45 U.S.L.W. 3690 (U.S. April 18, 1977). That case would not control here regardless of whether a warrant is eventually required because those inspections are specifically authorized by Congress.

warrantless) administrative search under the Fourth Amendment. While "Congress has broad authority to fashion standards of reasonableness," *Colonnade* v. *United States, supra* at 76, so that warrants are on rare occasions not required, congressional authorization of the search itself has always been required. "The legality of the search depends . . . on the authority of a valid statute." *United States* v. *Biswell, supra* at 315. As in *United States* v. *Ramsey*, 45 U.S.L.W. 4577 (U.S. June 6, 1977), in which the government made searches "pursuant to and within the scope of a congressional act, [the] searches were permissible." *Id.* at 4579.[20]

II.

The Validity of 41 C.F.R. § 60-1.4(e) Which Imposes Executive Order on Nonconsenting Contractors

A. Abrogation of Common Law

> The Secretary of Labor abrogated common law principles of contract law and thereby exceeded his authority in promulgating a regulation [41 C.F.R. § 60-1.4 (e)] which incorporates the equal opportunity clause without consent into all contracts which do not physically contain it.

As noted *supra*, MP&L has never contractually agreed to the terms of the Executive Order. The Executive Order is silent with respect to contracts which do not contain the equal opportunity clause. The Secretary of Labor wrote an implementing regulation which states that the equal opportunity clause "shall be considered to be a part of every contract and subcontract . . . whether or not it is physically included in such contract." 41 C.F.R.

20. *See also* Almeida-Sanchez v. United States, 413 U.S. 266; GM Leasing Corp. v. United States, 429 U.S. 339 (1977).

§ 60-1.4(e). Under this regulation, the Secretary unilaterally imposes on nonconsenting contractors this clause which states that they "agree" to the Executive Order.

The question presented here is whether an administrator can write a regulation which affects government contracts only and abrogates a principle of law of the common law of contracts.

It is black-letter law that each party to a contract must consent to all the terms of the contract. Further, nothing can be incorporated by reference in a contract unless the contract contains a clear reference to the extraneous document which is to be incorporated. *Guerini Stone Co.* v. *Carlin Const. Co.*, 268 U.S. 186 (1925); *JS&H Const. Co.* v. *Richmond County Hospital*, 473 F.2d 212 (5th Cir. 1973); 17(a) C.J.S., *Contracts*, § 299 at 136.

These common law principles are applicable to MP&L's contract with the government. This Court has consistently held that when the government enters the marketplace and executes a contract to secure goods and services, that

> [C]ontract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were made between individuals.

Reading Steel Casting Co. v. *United States*, 268 U.S. 186, 188 (1925). Further,

> [I]t is customary where *Congress* has not adopted a different standard to apply to the construction of government contracts the principles of general contract law.

Priebe & Sons v. *United States*, 332 U.S. 407, 411 (1947) (emphasis added). The power of Congress to apply a different standard is not questioned here; the power of an

administrator is. Notwithstanding the clear language used by this Court, the Secretary's regulation challenged here abrogates the common law principle of incorporation by reference resulting in the government not being bound by the same rules of common law as ordinary citizens. This regulation supercedes the common law otherwise applicable to government contracts and thereby makes substantive law.

The power of an administrator to write a regulation is not the power to make law. *Manhattan General Equipment* v. *Commissioner*, 297 U.S. 129 (1936). Since the Secretary has exercised a power which requires an act of Congress, he has attempted to make law.[21] Since the Secretary has no such power, the regulation is void.

B. Impairment of Government Contracts

The above regulation is also void because it impairs the obligations of the government's contract with MP&L.

The regulation is invalid on the alternative ground that it alters the substantive terms of government contracts and thereby violates MP&L's Fifth Amendment right by impairing the obligations of the contract. "Rights against the United States arising out of contract with it are protected by the Fifth Amendment." *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). "Legislation [or regulations] which . . . add new duties or obligations [to a contract] necessarily impairs the obligation of the contract." *Northern Pacific RR. Co.* v. *Minnesota*, 208 U.S. 583, 591 (1908). Since the

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21. The court of appeals held that the regulation is valid because it "did nothing more than give teeth to the mandate of the Order." NOPSI at 465. The court of appeals applied an erroneous legal test. The question is not whether the regulation is weak or strong, but whether it makes law by doing what only Congress can do. *See* Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936).

regulation imposes additional obligations on unconsenting contractors, the obligations of the contract are thus impaired.[22]

Of course, not every impairment of a government contract violates the Fifth Amendment. This Court has pointed out that under limited circumstances, *Congress* (as well as the states) can constitutionally impair the obligations of government contracts "if it is reasonable and necessary to serve an important public purpose." *United States Trust Co.* v. *New Jersey,* 45 U.S.L.W. 4418, 4424 (U.S. April 27, 1977).

As in the preceding argument, this regulation effectuates a result which this Court has said only Congress can do. Above, it was abrogating common law contract principles applicable to government contracts; here, it is impairing the obligation of a government contract. Since MP&L's government contracts are protected by the Fifth Amendment and can be impaired *only* by Congress(and then only in limited situations), an administrator cannot write a regulation which constitutionally requires nothing short of an exercise of legislative power.[23]

The court of appeals did not deal with this issue in constitutional terms but simply held that consent to the Executive Order was not necessary.

> Agreement to [the Executive Order is unnecessary: where regulations apply and require the inclusion of a contract clause in every contract, the clause is

22. If a contractor had agreed as a part of his contract to the rules and regulations of the Secretary, his contracts would not be impaired by those regulations.

23. Otherwise, the government could totally ignore its contracts. After having struck an arms length bargain, the government could seek better terms or get out of unfavorable ones by simply writing a regulation.

> incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties.

NOPSI at 469. That statement shows a fundamental misconception of the distinction between the permissible effect of laws and regulations on public contracts and private contracts. As this Court recently affirmed:

> There is a clear distinction between the power of Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagement.

United States Trust Co. v. *New Jersey, supra* at 4424 n.25, quoting *Perry* v. *United States,* 294 U.S. 330 (1935). The court of appeals failed to recognize that laws and implementing regulations can impair the obligations of *private* contracts, but the Fifth Amendment limits the impairment of *public* (government) contracts. While Congress in limited situations can impair the obligations of government contracts, it has not done so here. The FPASA does not impair MP&L's contract, nor does the Executive Order. It is this regulation which impairs the obligation of the contract by imposing an additional liability not incorporated therein in violation of the Fifth Amendment.

CONCLUSION

If this Court grants this petition and reverses the decision of the court of appeals, the impact of the holding would depend upon the questions reached. The holding would be narrow if this Court held that the regulation which imposes the Executive Order on nonconsenting

contractors is void. The practical effect of such a holding would not substantially effect the Executive Order, since most contractors submit bids and enter contracts on government forms which contain the equal opportunity clause. Those contractors are bound by virtue of their consent.

Even under a broad holding that the Executive Order itself is unauthorized, government contractors would still be subject to Title VII of the Civil Rights Act with its comprehensive remedies for employment discrimination.

This petition does not in any way reflect upon the importance of eliminating employment discrimination as a public policy consideration. The goal of eliminating discrimination is indeed a most important and salutary policy of the federal government. The point of contention is, as the dissent below pointed out, that when the government chooses to eliminate discrimination by inserting an equal employment opportunity clause in "its contracts rather than by enacting a statute, there are limits to what can be accomplished." In short, Congress can readily and constitutionally implement the porgram here under consideration. The executive, however, is constitutionally prohibited from engaging in such lawmaking.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, E. GRADY JOLLY, one of the attorneys of record for the Petitioner, do hereby certify that I have mailed copies of the above Petition to counsel listed below:

Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
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David L. Rose
Naomi White
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Washington, D. C. 20530

Robert E. Hauberg
United States Attorney
P. O. Box 2091
Jackson, Mississippi 39205
This the 21st day of October, 1977.

E. GRADY JOLLY

APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

MISSISSIPPI POWER & LIGHT COMPANY,
Defendant-Appellant.

No. 75-2590.

United States Court of Appeals,
Fifth Circuit.

June 6, 1977.

United States brought action to compel compliance by utility with equal opportunity obligations of Executive Order 11246. The United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., Chief Judge, entered order adverse to utility, and utility appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) the United States could impose the equal opportunity obligations of Executive Order 11246 and the implementing rules and regulations, which prohibit employment discrimination by government contractors, on a state-franchised public utility which, pursuant to its franchise, sells substantial amounts of electricity to the United States and enjoys an apparent near-monopoly in its area in the sale of electric utility service, even though the utility had not agreed to be bound by the Executive Order, and (2) Court of Appeals, in exercise of its equitable discretion, would set aside district court's general injunctive order, since

case could be best dealt with at current stage through Government's own administrative compliance processes.

Modified and affirmed.

Clark, Circuit Judge, dissented with an opinion.

1. Civil Rights (Key) 31

United States did not violate its own regulations by failing to issue a 30-day show cause notice before instituting action to compel compliance by utility with equal opportunity employment obligations of Executive Order 11246, since, under applicable regulations then in force, the 30-day show cause notice was required to be issued only where the federal compliance agency had determined to seek cancellation or termination of an existing contract or debarment of a contractor from future contracts. Executive Order No. 11246, § 201 et seq. as amended 42 U.S.C.A. § 2000e note.

2. Civil Rights (Key) 9.10

The United States could impose the equal opportunity obligations of Executive Order 11246 and the implementing rules and regulations, which prohibit employment discrimination by government contractors, on a state-franchised public utility which, pursuant to its franchise, sells substantial amounts of electricity to the United States and enjoys an apparent near-monopoly in its area in the sale of electric utility service, even though the utility had not agreed to be bound by the Executive Order. Executive Order No. 11246, § 201 et seq. as amended 42 U.S.C.A. § 2000e note.

3. Federal Courts (Key) 932

Where utility, which supplied energy to United States, was found to be a government contractor subject to equal

employment obligations of Executive Order 11246, which prohibits employment discrimination by government contractors, Court of Appeals, in the exercise of its equitable discretion, set aside district court's general injunctive order, since case could be best dealt with at current stage through Government's own administrative compliance processes. Executive Order No. 11246, § 201 et seq. as amended 42 U.S.C.A. § 2000e note.

Appeal from the United States District Court for the Southern District of Mississippi.

Before AINSWORTH and CLARK, Circuit Judges, and HUGHES,* District Judge.

AINSWORTH, Circuit Judge:

The United States brought this suit in 1974 to compel the compliance of appellant, Mississippi Power & Light Company (MP&L), with the equal opportunity obligations of Executive Order 11246, *as amended*,[1] and the implementing rules and regulations, 41 C.F.R. § 60-1.1 *et seq.* The district court held that MP&L is a government contractor

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*Senior District Judge for the Northern District of Texas, sitting by designation.

1. 30 Fed.Reg. 12319 (1965), 3 C.F.R. § 339 (1964-1965 Compilation), *as amended by* Exec. Order No. 11375, 32 Fed.Reg. 14303 (1967), 3 C.F.R. § 406 (1969), 42 U.S.C.A. § 2000e note (1974), *superseded in part (irrelevant for purposes herein) by* Exec. Order No. 11478, 34 Fed.Reg. 12985 (1969), 3 C.F.R. § 133 (1969 Compilation), 42 U.S.C.A. § 2000e note (1974). The Executive Order prohibits employment discrimination by government contractors. The Order requires that all covered government contracts contain a clause under which the employer agrees not to discriminate in employment on the basis of race, color, religion, sex or national origin, and further agrees to take affirmative action to achieve the equal opportunity objective. Exec. Order No. 11246, § 202(1). The Secretary of Labor is responsible for the administration of the federal contract compliance program, and is empowered to issue rules and regulations to implement the Order. *Id.* § 201. For a more detailed description of the program and its history, see our opinion in the companion case, *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 5 Cir.

subject to the Executive Order and the rules and regulations adopted pursuant thereto. The court held, moreover, that MP&L violated the Executive Order by denying the Government access to the company's premises and books. Therefore, the court issued a general injunctive order, permanently enjoining MP&L from failing or refusing to comply with the Order, so long as the company has not obtained an exemption from the program's coverage, and from refusing to allow the General Services Administration (GSA) or other appropriate federal agencies to conduct compliance reviews of MP&L and to have access to the company's premises and books. In a subsequent order, the district court stayed the injunctive order, pending appeal to this court.

This case presents the question whether the Government can impose the equal opportunity obligations of the Executive Order on a state-franchised public utility which, pursuant to its franchise, sells substantial amounts of electricity to the Government and enjoys an apparent near-monopoly in its area in the sale of electric utility service, even though the company has not agreed to be bound by the Executive Order. For the reasons stated in *United States* v. *New Orleans Public Service, Inc.* (*NOPSI*), 553 F.2d 459, the companion case which we also decide today, we hold that the Government can compel the company's compliance. Consistent with our opinion in *NOPSI*, we affirm the opinion of the district court, but set aside the court's general injunctive order.

MP&L is a public utility franchised by the Mississippi Public Service Commission to supply electricity to a substantial portion of the western half of Mississippi. The area covered by the company includes the cities of Jackson and Vicksburg. MP&L is the primary supplier of electric energy in that area, the company's franchise requiring

that MP&L sell electricity to any consumer (including the Federal Government) requesting it. Thus, MP&L presently sells over $100,000 worth of electric service annually to various government agencies (including the GSA) with facilities in the state. The Government asserts that MP&L enjoys a "monopoly" under its franchise. The district court's opinion does not address this point. However, MP&L itself admits that "the government had no alternative source of electrical service." This fact triggers the policy we today announce in *NOPSI*, and we need not inquire further into the structure of the particular utility market or the precise details of MP&L's franchise.

The facts fully support the district court's resolution of the issue whether MP&L is a government contractor subject to the Executive Order. The company admits that it has written and unwritten agreements to provide electric service to various federal agencies at fifteen different facilities, including the Post Office and Courtroom facilities at Jackson, Vicksburg and Greenville, and the Peoples-Newman Building in Vicksburg. Under these contracts, the company has supplied the Government for many years, and each of the facilities receives over $10,000 worth of electricity annually. The district court took particular note of the contracts for the Post Office and Courtroom facilities at Jackson and Vicksburg. The Government stated that the total value of those contracts, which were written, has been greater than $50,000 since 1973. MP&L admits that, while those contracts were executed in 1950, they have been amended through rate changes since the effective date of the Executive Order. However, MP&L states that only one of the contracts—that for the Greenville Post Office and Court House—has been executed since the Order's effective date and that none of the contracts contains the equal opportunity clause required by the Executive Order. MP&L asserts that it is not subject

to the Order because it has never contractually agreed to be bound by it. We incorporate herein the reasoning of *NOPSI* insofar as is necessary to reject appellant's contention. The Government attempted to conduct compliance reviews of MP&L in 1972 and 1973, but the company responded that it was not subject to the Order. MP&L admits that it denied access to its premises to GSA officials in 1972.[2] Having found that the Executive Order was applicable to MP&L, the district court was clearly correct in holding that the company's refusal to comply with the Order constituted a violation of that mandate.

In this appeal, the company raises a number of issues. Specifically, MP&L makes the following assertions: (1) that the Government's stated cause of action is not one upon which relief can be granted because said cause is neither authorized by statute nor recognized at common law; (2) that the Secretary of Labor exceeded his authority in issuing 41 C.F.R. § 60-1.4(e)[3] because the regulation runs contrary to common-law contracts principles and principles of government-contract law; (3) that the district court opinion in the *NOPSI* case, which was adopted by the trial court herein, held erroneously that a contract

2. The district court also observed that, when the GSA that year tried to negotiate a formal contract with MP&L for electric service at the Federal Post Office and Court House building in Greenville, and the Government's proposed contract included, *inter alia*, both the nondiscrimination clause required by the Executive Order and a provision for access to the company's records, MP&L returned that contract unsigned and substituted in its place a service agreement which lacked the two provisions.

3. The regulation, 41 C.F.R. § 60-1.4(e), *as amended by* 42 Fed.Reg. 3454 (1977), provides:

> *Incorporation by operation of the Order.*—By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

provision not agreed to by the parties is incorporated into the contract when a government regulation requires the provision's inclusion in the contract; (4) that the provisions in the Executive Order and implementing regulations[4] for Government access to a contractor's books and records contravene the company's fourth amendment rights; (5) that the regulatory provision[5] for Government access to a contractor's premises also violates the fourth amendment, and is void not only for that reason but also because it was beyond the authority of the Secretary of Labor; (6) that the *NOPSI* court erred in holding that 41 C.F.R. § 60-1.4(e) makes *NOPSI* subject to the Executive Order, pursuant to the company's unwritten contracts with the Government, and that the same principle applies herein with respect to MP&L; (7) that the *NOPSI* court erroneously held that a company such as *NOPSI* is subject to the Executive Order by virtue of 41 C.F.R. § 60-1.4(d);[6] (8) that the Government has violated its own rules and regulations, 41 C.F.R. § 60-2.2(c),[7] by failing to give MP&L

4. Section 202 of the Order requires that covered contracts include a provision whereby the contractor agrees to permit access to its books and records by the contracting agency and Secretary of Labor so that they can determine the contractor's compliance with the Order.

41 C.F.R. § 60-1.43 requires contractors to permit access to their premises during normal business hours in order that on-site compliance reviews can be conducted and company books and records inspected.

5. 41 C.F.R. § 60-1.43. *See* note 4 *supra*.

6. 41 C.F.R. § 60-1.4(d), *as amended by* 42 Fed.Reg. 3454 (1977), provides for the incorporation by reference of the equal opportunity clause in all government contracts.

7. 41 C.F.R. § 60-2.2(c)(1974) specifies the procedures to be followed by the appropriate government agencies between an agency's discovery of a contractor's noncompliance with the affirmative action obligations of the Order and the commencement of enforcement proceedings. The procedures include the issuance under certain circumstances of a show cause notice. According to the regulation,

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a 30-day show cause notice prior to instituting this action, and therefore is estopped from pursuing this case; and (9) that the district court erred in holding that the Executive Order has the force and effect of law. MP&L's contentions are similar, although not identical in all respects, to those of the appellant in *NOPSI*. We find that, with the exception of MP&L's eighth assertion *supra* and some others which are without merit and do not require discussion, all of the preceding contentions are disposed of by our *NOPSI* opinion.

Footnote continued—

> [i]mmediately upon finding that a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable, the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.
>
> (1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60-1.26(b) of this chapter, giving the contractor 14 days to request a hearing. If a request for hearing has not been received within 14 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.
>
> (2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60-1.26(b) of this chapter.

[1] MP&L's argument that the Government violated its own regulations by failing to issue a 30-day show cause notice before instituting this action is also lacking in merit. MP&L relies on 41 C.F.R. § 60-2.2(c). The version of that regulation which was in effect at the time this suit was commenced directed the issuance by the compliance agency of such a notice in the situation where the Government has found that "a contractor has no affirmative action program or has deviated substantially from an approved affirmative action program or that his program is not acceptable." 41 C.F.R. § 60-2.2(c) (1974). The Government argues that this requirement is inapplicable to the situation at bar. According to the Government, the 30-day show cause notice must be issued only where the federal compliance agency has determined to seek cancellation or termination of an existing contract or debarment of a contractor from future contracts. The correctness of this position is obvious from the language of the regulation, *see id.* § 60-2.2(c)(1) and (2), which is quoted in the margin.[8] This suit was not invalid *ab initio* under that ver-

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8. *See id.* The regulation can be read as requiring the issuance of a show cause notice whenever there is a finding by the Government that the contractor did not have an affirmative action program, that he had deviated substantially from such a program or that he had such a program but it was unacceptable. To prove the provision's inapplicability, the Government argues, *inter alia*, that such a determination could not be made in this case because of MP&L's refusal to permit a compliance review and to supply information requested from it by the GSA. This argument strikes us as contrived. MP&L's denials of coverage certainly put the Government on notice that, in all likelihood, the company was not complying with the Executive Order's affirmative action obligation. On the other hand, MP&L's argument on the show cause issue is purely technical, considering that the company admits that the Government's attempts to conduct a compliance review date back to 1972.

Subsection (c)(1) of the regulation states that the contractor's failure to show good cause for his noncompliance with the affirmative action requirement or his failure to remedy such noncompliance within the show cause period should immediately

(Continued on following page)

sion of the regulation in effect at the time this suit was commenced. Our decision as to this issue is buttressed by the present version of the regulation, which reflects a recent amendment. *See* 42 Fed.Reg. 3454, 3457, 3462 (1977). The requirement of a 30-day show cause notice has been explicitly limited to the situation where the Government contemplates administrative enforcement.[9] As the Labor Department's accompanying comments thereto indicate,[10] the regulation was changed to make clear that the provision is inapplicable when judicial enforcement is contemplated. Those comments specifically endorse the district court's opinion herein, and we, similarly, decline to reverse it on the ground of the show cause issue.

Footnote continued—

result in the Government's taking steps to impose the appropriate sanctions, i. e., cancellation or termination and debarment. Subsection (c)(2) directs the Government to begin proceedings for the imposition of those sanctions if the contractor does not make satisfactory adjustments to bring himself into compliance during the show cause period. Thus, the Government is correct in pointing out that the regulation cited by MP&L is addressed to a different situation than the one here, where the Government is seeking to positively enforce the obligations of the program.

9. The current version of the regulation provides in pertinent part:

> *Whenever administrative enforcement is contemplated,* the compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

42 Fed.Reg. 3454, 3462 (1977), 41 C.F.R. § 60-2.2(c)(1) (emphasis added).

10. [L]anguage has been added to the show cause provision to clarify that it is only applicable when administrative enforcement under Part 60-2 (as opposed to judicial enforcement) is contemplated. This is consistent with OFCCP policy and federal court decision in *"United States* v. *Mississippi Power and Light Co."*, 9 EPH (CCH) ¶ 10,164 (S.D.Miss., 1975), appeal pending, and *"United States* v. *New Orleans Public Service, Inc.,"*, 8 EPD (CCH) ¶ 9795 (E.D.La., 1974), appeal pending, and is reflected in 41 C.F.R. 60-1.26.

42 Fed.Reg. 3454, 3457 (1977).

[2] For the foregoing reasons, we affirm the opinion of the district court holding that MP&L is a government contractor covered by the Executive Order. We find for the Government as to each of the issues raised by MP&L on appeal, and we incorporate herein our decision in *NOPSI* insofar as it pertains to the issues in the instant case.

[3] Accordingly, in the exercise of our equitable discretion and for the same reasons as are enumerated in *NOPSI,* we set aside the district court's general injunctive order. Having found that MP&L is a government contractor subject to the equal opportunity obligations of the Executive Order and that MP&L's objections to the application herein of the Order are without merit, we hold that this case best would be dealt with at this stage through the Government's own administrative compliance processes. Therefore, we direct the Government to pursue that approach before again seeking the injunctive mandate of this court, if such aid in fact becomes necessary.

This result is influenced by the assertion of MP&L's counsel during oral argument that the company stated at one point that it would agree to a GSA investigation pursuant to Executive Order 11246, even though MP&L took the position that it was not covered, in order to avoid litigation. While such willingness ended with the Government's pursuit of this action, MP&L's counsel stated, the company would comply with an investigation if ordered to do so by the court. Our decision as to the merits of this case has the practical effect of an order, and we see no reason to compel the company's compliance under threat of our contempt power, given MP&L's apparent willingness to proceed voluntarily and in good faith. We note, as we did in *NOPSI,* that our decision herein as to remedy is based solely on equitable considerations. The

district court had the power to compel by injunction MP&L's compliance with the Executive Order; however, the exercise of that power was not yet appropriate or necessary. Our remedial tack today is premised on the assumption that MP&L will now comply fully, promptly and in good faith with Executive Order 11246, in accordance with this opinion and with *NOPSI*. We remind the company that any further delay would be intolerable.

MODIFIED AND AFFIRMED.

CLARK, Circuit Judge, dissenting:

For the reasons set forth in my dissenting opinion in *United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459 (1977), I respectfully dissent.

APPENDIX B

[553 F.2d 459]

UNITED STATES of America,
Plaintiff-Appellee,

v.

NEW ORLEANS PUBLIC SERVICE, INC.,
Defendant-Appellant.

No. 75-1130.

United States Court of Appeals,
Fifth Circuit.

June 6, 1977.

The United States brought action to compel utility's compliance with Executive Order 11246 which prohibits employment discrimination by government contractors. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., entered decision and injunction adverse to utility, and utility appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) Congress has authorized executive order program whereby a nondiscrimination clause is imposed on all government contractors, regardless of whether the employers have especially consented to the clause; (2) a public utility which, under a city permit, enjoyed a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas and which sold such energy to the United States in substantial amount could be required by United States to comply with the equal opportunity obligations of Executive Order 11246 even though the utility had not expressly agreed to be so bound; (3) the executive order program is not invalid on asserted ground

that the inspection procedures contemplated by the program are violative of the Fourth Amendment; (4) the task of obtaining the utility's compliance with the executive order program should have been left to the government's own administrative compliance processes, and (5) fundamental fairness required that Government first obtain company's voluntary compliance before calling for support of court's injunctive powers.

Modified and affirmed.

Clark, Circuit Judge, dissented with an opinion.

1. United States (Key) 28

Executive Order of the President has the force and effect of law.

2. Administrative Law and Procedure (Key) 417

An executive department regulation which is issued pursuant to an Act of Congress and by the department responsible for the administration of the statute has the force and effect of law if it is not in conflict with an express statutory provision.

3. Administrative Law and Procedure (Key) 390
Labor Relations (Key) 27

Appropriate measure of validity of implementing regulation of Department of

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Labor was whether it was within scope of executive order.

4. Administrative Law and Procedure (Key) 413
Labor Relations (Key) 27

Court would give special deference to Labor Department's interpretation of executive order which such Department was charged to administer.

5. Civil Rights (Key) 9.10

Regulation of Secretary of Labor which did nothing more than give teeth to mandate of executive order prohibiting employment discrimination by government contractors was thus within scope of the presidential directive, and the Department of Labor acted within the scope of the order in applying it to a public utility which sold energy to United States in substantial amount. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

6. Civil Rights (Key) 9.10

Congress has authorized executive order program whereby a nondiscrimination clause is imposed on all government contractors, regardless of whether the employers have especially consented to the clause. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

7. United States (Key) 55

Government has unrestricted power to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases, and government contractor's agreement to such conditions is unnecessary.

8. Public Contracts (Key) 16

Where regulations apply and require the inclusion of a contract clause in every government contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties.

9. Civil Rights (Key) 9.10

A public utility which, under a city permit, enjoyed a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas and which sold such

energy to the United States in substantial amount could be required by United States to comply with the equal opportunity obligations of Executive Order 11246, which prohibits employment discrimination by government contractors, even though the utility had not expressly agreed to be so bound. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

10. Searches and Seizures (Key) 7(1)

Executive order program whereby government contractors are prohibited from employment discrimination is not invalid on asserted ground that the particular inspection procedures contemplated by the program herein are violative of the Fourth Amendment. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note; U.S.C.A. Const. Amend. 4.

11. Civil Rights (Key) 32(1)

Where district court found public utility, which sold energy to United States in substantial amount, to be covered by Executive Order 11246, which prohibits employment discrimination by government contractors, the task of obtaining the utility's compliance with the executive order program should have been left to the Government's own administrative compliance processes, and thus district court should not have retained jurisdiction over suit and dictated a mandate of injunction contemplating substantive enforcement of the Executive Order. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

12. Civil Rights (Key) 32(1, 2)

Justice Department can properly bring judicial proceedings to enforce provisions of Executive Order 11246,

which prohibits employment discrimination by government contractors, without first proceeding by conciliation and persuasion and before the Office of Federal Contract Compliance or the compliance agency, such as the General Services Administration, has first exhausted the administrative procedures of the program. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

13. Civil Rights (Key) 32(1)

Where utility had never agreed to be bound by Executive Order 11246, which

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prohibits employment discrimination by government contractors, fundamental fairness required that Government first obtain company's voluntary compliance before calling for support of court's injunctive powers. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

14. Civil Rights (Key) 9.10

Regulations implementing Executive Order 11246, which prohibits employment discrimination by government contractors, are construed to require a written affirmative action program. Executive Order No. 11246 as amended 42 U.S.C.A. § 2000e note.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH and CLARK, Circuit Judges, and HUGHES,* District Judge.

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*Senior District Judge of the Northern District of Texas sitting by designation.

AINSWORTH, Circuit Judge:

Appellant, New Orleans Public Service, Inc. (hereinafter NOPSI), appeals from an adverse decision of the district court holding that NOPSI is a government contractor subject to Executive Order 11246,[1] and permanently enjoining NOPSI from failing and refusing to comply with the Order, as amended, and the implementing rules and regulations. Questions as to the force, coverage and enforcement of the Executive Order are involved. The principal issue today before us is whether a public utility which, under a city permit, enjoys a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas and which sells such energy to the Government in substantial amount can be required by the Government to comply with the equal opportunity obligations of Executive Order 11246, even though the utility has not agreed to be so bound. We hold that the Government can compel such a utility to follow the Order; however, we disagree with the district court as to the appropriate remedy.

Executive Order 11246 prohibits employment discrimination by government contractors. The Order was issued by President Johnson in 1965, and requires that all covered government contracts contain a nondiscrimination clause, including an agreement to take affirmative action to achieve the equal opportunity goals of the Executive Order's mandate. *Id.* § 202.

NOPSI is a public utility which produces, distributes and sells electric power to consumers located in that part

1. 30 Fed.Reg. 12319 (1965), 3 C.F.R. 339 (1964-1965 Compilation), *as amended by* Exec.Order No. 11375, 32 Fed.Reg. 14303 (1967), 3 C.F.R. 406 (1969), 42 U.S.C.A. § 2000e note (1974), *superseded in part (irrelevant for purposes herein) by* Exec.Order No. 11478, 34 Fed.Reg. 12985 (1969), 3 C.F.R. 133 (1969 Compilation), 42 U.S.C.A. § 2000e note (1974).

of New Orleans, Louisiana, on the east bank of the Mississippi River, and sells and distributes natural gas to consumers throughout the city. The company sells its gas and electricity pursuant to indeterminate permits,[2] like franchises, issued by the City Council of New Orleans. NOPSI is the only company with indeterminate permits to supply New Orleans with gas, and the east bank of the city with electricity. If any New Orleans consumer (including the Federal Government) on the east bank wishes to buy electric service, the consumer must purchase from NOPSI. NOPSI also provides most of the natural gas service to consumers (including the Federal Government) throughout the city,

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and in those cases where companies receive their gas from other sources, NOPSI has agreed to the arrangement and has built and maintained the transmission line connecting the company with the parish boundary. The federal agencies which buy electricity from NOPSI are on the east bank, and have no alternative source of electric power. NOPSI is regulated by the City Council, which in 1973 granted the company rate increases for its electric and natural gas services to customers.

A number of federal agencies and installations in New Orleans are major purchasers of electricity and natural gas from NOPSI. In 1973 NOPSI supplied such federal users with nearly $2 million worth of electricity utility service, and with more than $2,680,000 worth of electric and natural gas utility services combined. There are nine federal agencies which at the present time and during the period

2. Under an indeterminate permit, the company is granted the right to supply such services indefinitely, but the grantor City Council retains the right to buy the utility operation from the company, thus terminating the permit.

1965-1973 each have received over $10,000 annually in combined gas and electric services from NOPSI; some of those each have received more than $50,000 in such utility services annually. The biggest user, the Michoud Assembly Facility (hereinafter Michoud) of the National Aeronautics and Space Administration (hereinafter NASA), alone received approximately $1.4 million worth of electricity and natural gas in 1973. The agencies are billed monthly and pay for the services on a regular basis.

According to the district court opinion, NOPSI supplies the Government with utility services pursuant to various contractual arrangements. The court found that NOPSI is supplying 22 federal agencies under written agreements. Some of those contracts predated the Executive Order, but the court found that they were modified by, *inter alia*, the 1973 revised rate schedules which were approved by the City Council; were applied to the particular contract by NOPSI; and were accepted, through payment, by the agency. A few of those contracts contained nondiscrimination clauses required by earlier Executive Orders. In the case of two agencies in the group, the Government had sent NOPSI a proposed new contract, containing the nondiscrimination clause required by Executive Order 11246, but NOPSI rejected the proposed contract on the ground that the clause was unsatisfactory. Other contracts were signed in 1972 or on dates not specified by the district court opinion and were modified by the revised rate schedules in 1973.

In addition, the district court found that NOPSI is supplying six other federal agencies pursuant to contracts which were not formal, written agreements. Some of those contracts, for example, were based on letter requests from the federal agencies; another was based on an oral agreement.

Somewhat more complicated is the relationship between NOPSI and NASA's Michoud facility. Disagreement in that relationship precipitated the instant litigation. NOPSI supplied Michoud with electricity and natural gas under a written contract between the utility and the space agency which was signed in 1965 and terminated according to its own terms in June 1970. That contract contained an equal opportunity clause which was required by Executive Order 10925, the predecessor of Executive Order 11246. The contract also contained a limitation clause restricting the scope of the contract to the Michoud operations. Because of the NASA-NOPSI relationship involving utilities service at Michoud, the Government has tried in the past to review NOPSI's compliance with Executive Order 11246, but NOPSI has resisted on the ground that it was not covered by the Order. Attempts between the Government and NOPSI to negotiate a new utilities contract for Michoud broke down, with the Government unwilling to agree to a scope limitation like that in the 1965 contract, and NOPSI unwilling to agree to an equal opportunity clause without such a limitation. Nevertheless, NASA asked NOPSI to continue supplying Michoud, and NOPSI has continued to do so even though the formal contract has expired, subject to the rate schedules set out by NOPSI at the time of the termination of the written contract. The district court, after surveying the pre-

ceding facts, held that a contract existed between NASA and NOPSI.[3]

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3. The facts indicating the circumstances under which NOPSI supplied energy to the various government agencies are laid out fully in the district court's opinion, and are incorporated herein except insofar as they indicate specific contractual arrangements between NOPSI and the Government. The long-standing seller-purchaser relationship indisputedly makes NOPSI a government contractor, and further contractual underpinning is unnecessary for our holding.

The Government's efforts to conduct a compliance review of NOPSI began in 1969, and further unsuccessful attempts were made through 1972. This action was initiated by the Government through the Justice Department in 1973 to compel NOPSI's compliance with the Executive Order. After holding that NOPSI was covered by the Order, the district court permanently enjoined the utility from failing or refusing to comply with the Order and implementing regulations. The injunction reached NOPSI's refusal to allow the Government to conduct compliance reviews of NOPSI, and authorized the parties to begin discovery. In addition, the court retained continuing jurisdiction to effectuate NOPSI's full compliance with the Executive Order.

I. The Validity and Applicability of the Executive Order

A. The Executive Order Program

The Executive Order requires that every nonexempt government contract contain a clause under which the employer agrees not to discriminate in employment on the basis of race, color, religion, sex or national origin, and further agrees to take affirmative action to achieve the equal opportunity objective. Exec. Order No. 11246, § 202(1). The Secretary of Labor is responsible for the administration of the federal contract compliance program, and is empowered to issue rules and regulations to implement the Order. *Id.* § 201. In addition to the nondiscrimination clause, the required contract provision stipulates that the contractor will comply with all provisions of the Order and the implementing rules and regulations, *id.* § 202(4), that he will furnish all the information and

reports[4] required by the Order and the regulations and that he will permit access to his books and records by the contracting agency and the Secretary of Labor in order that they may determine his compliance. *Id.* § 202(5).

The Secretary of Labor is given various powers under sections 205 to 208 to carry out his mandate, including the authority to investigate the employment practices of government contractors. *Id.* § 206. Elsewhere the Order sets out various sanctions and penalties, one of which is that the Secretary of Labor may recommend to the Justice Department that it enforce by appropriate proceedings, including suits for injunctive relief, the provisions of the required nondiscrimination clause. *Id.* § 209(a)(2). Before such proceedings are initiated, though, the Order directs that "[u]nder rules and regulations prescribed by the Secretary of Labor," the contracting agency shall make reasonable efforts to achieve compliance by "conference, conciliation, mediation, and persuasion." *Id.* § 209(b).

For purposes of the instant case, the critical—and disputed—provision of the federal contract compliance program is found in the Secretary of Labor's regulations, 41 C.F.R. § 60-1, *as amended by* 42 Fed.Reg. 3454, *et seq.* (1977), and states:

> (e) *Incorporation by operation of the Order.*—By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

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4. Section 203 of the Order requires the filing of compliance reports by the contractor.

§ 60-1.4(e).[5] *Cf. id.* § 60-1.4(d) (incorporation by reference). The "equal opportunity

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clause" referred to in the regulation is the nondiscrimination clause set forth in the Executive Order. "Contract" means any "government contract," and "government contract" is defined to include "any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services." *Id.* § 60-1.3. The term "services," as used in the regulation, includes utility services. *Id.* Executive Order 11246 states in section 202 that the Order applies to every government contract entered into after the effective date unless the contract is specifically exempted under section 204. No such exemption is applicable in the instant case.[6] Therefore,

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5. We note that, although certain changes in the regulations have occurred as a result of the 1977 amendments, the result we reach today would be the same whether or not the new regulations were in effect. Furthermore, we would apply the current version of the regulations in any event, since this appeal involves both a program requiring present compliance by NOPSI and a continuing injunctive order of the district court.

The language of the provision cited in the accompanying text reflects a minor change. The Labor Department's comments state:

> The effect of the change in § 60-1.4(e) is to make it clear that, consistent with the intent of the Secretary and with existing case law, the equal opportunity clause is considered a part of all nonexempt contracts, including unwritten contracts. . . .

42 Fed.Reg. 3454 (1977).

6. Section 204 of the Order provides that the Secretary of Labor may grant an exemption to a specific contract because of "special circumstances," or may exempt

> facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order.

(Continued on following page)

assuming no problems concerning the Order's basic validity or its application herein, NOPSI is clearly subject to the requirements of the program.

B. NOPSI's Argument

NOPSI argues that the Executive Order and the regulations do not give the Labor Department's Office of Federal Contract Compliance—the agency which administers the Executive Order—authority to compel the company to fulfill the affirmative action obligations of the program. In support of its position, NOPSI offers three arguments which speak to the validity of the regulations as herein applied, from the point of view of both executive power and general contract law.

First, NOPSI points out that it did not seek the Government's business or any government contracts. NOPSI contends that the relevant judicial decisions on the Executive Order all involved employers that sought the Government's business, *e.g.*, by bidding for government contracts, or were unquestionably government contractors, and that each case therefore presented an element of consent which is here lacking. Second, the company argues that it has consistently refused to accept the Order's affirmative ac-

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Footnote continued—

. . .

No such exemption has been granted to NOPSI. Section 204(3) also provides for a class exemption, by rule or regulation, for contracts involving less than specified amounts of money. A contract which exceeds $10,000 (or a contract of a government contractor having an aggregate total of government contracts within a twelve-month period in excess of $10,000) is not exempt under section 204(3) from the requirements of the nondiscrimination clause. 41 C.F.R. 60-1.5, 42 Fed.Reg. 3454, 3459 (1977). Therefore, NOPSI is a nonexempt contractor. The effective date of the Order causes no problem since the case involves a contractual relationship which, in particular instances, has been renewed or modified by the parties since such effective date. *See* discussion *infra*.

tion obligation. This argument, related to the first, assumes the necessity of NOPSI's consent in order for the company to be bound by the nondiscrimination clause. Third, NOPSI contends that it is not furnishing energy to the Government pursuant to any contract, but instead is supplying such energy pursuant to its franchises, granted by the City, which require NOPSI to provide power to all consumers who request it. Under that argument, NOPSI's status as a City franchisee precludes its having the status of a Federal Government contractor, given the fact that NOPSI has refused to accede to the contract terms required by the Government. Accordingly, NOPSI and amicus Mississippi Power & Light Company, appellant in No.

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75-2590, 5 Cir., 1977, 553 F.2d 480, the companion case which we also decide today, challenge the application of the Executive Order both on the ground that it conflicts with the contractual principle of consent, and that it is action taken without authority from Congress.

C. The Program's Force and Effect

[1] The starting point of our analysis is the well-established proposition that the Order has the force and effect of law. *Southern Ill. Builders Ass'n* v. *Ogilvie*, S.D.Ill., 1971, 327 F.Supp. 1154, *aff'd*, 471 F.2d 680 (7 Cir., 1972); *Joyce* v. *McCrane*, D.N.J., 1970, 320 F.Supp. 1284; *U. S.* v. *Local 189, United Papermakers & Paperworkers*, E.D.La., 1968, 282 F.Supp. 39; *see Contractors Ass'n of Eastern Pa.* v. *Secretary of Labor*, 3 Cir., 1971, 442 F.2d 159, *cert. denied*, 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95. *Cf. Farkas* v. *Texas Instrument, Inc.*, 5 Cir., 1967, 375 F.2d 629, *cert. denied*, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471 (involved predecessor order, No. 10925);

Farmer v. *Philadelphia Elec. Co.*, 3 Cir., 1964, 329 F.2d 3 (involved No. 10925 and prior orders). From that proposition flows our ultimate conclusion as to the validity of applying the Order to NOPSI in the instant case.

This circuit has held that Executive Order 10925, the predecessor of No. 11246, was issued pursuant to statutory authority because of the relationship between the anti-discrimination provision in the Order and the purposes of 40 U.S.C. § 486(a), the statute governing, *inter alia*, government procurement. *Farkas, supra*, 375 F.2d at 632 n. 1. More recently, the Third Circuit concluded that that statute supplied the express or implied authorization of Congress for the Executive Order today before us, as applied to government procurement. *Contractors Ass'n, supra*, 442 F.2d at 170.

[2] Additional indicia of congressional support for the Labor Department's Executive Order program are discussed below, and furnish legal underpinning not only for the Executive Order, but for the regulation in dispute, 41 C.F.R. § 60-1.4(e), 42 Fed.Reg. 3454, 3459 (1977), as well. That is because an Executive Department regulation which is issued pursuant to an act of Congress and by the department responsible for the administration of the statute has the force and effect of law if it is not in conflict with an express statutory provision. *Maryland Cas Co.* v. *United States*, 251 U.S. 342, 349, 40 S.Ct. 155, 157-58, 64 L.Ed. 297 (1920); *See G. L. Christian & Assoc.* v. *United States*, 1963, 312 F.2d 418, 424, 160 Ct.Cl. 1, *cert. denied*, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314. We perceive no such conflict in the instant case.

[3-5] Furthermore, the appropriate measure of the regulation's validity is whether it was within the scope of the Executive Order. *See Contractors Ass'n, supra,*

442 F.2d at 175. In deciding that question, we give special deference to the Labor Department's interpretation of the Order which that department was charged to administer. *Id.*; *see Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *cf. Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971); *Power Reactor Dev. Co.* v. *International Union of Elec., Radio & Mach. Workers*, 367 U.S. 396, 408, 81 S.Ct. 1529, 1535, 6 L.Ed.2d 924 (1961). The Executive Order specifically authorized the issuance of implementing regulations by the Secretary of Labor and the disputed provision, 41 C.F.R. § 60-1.4(e), did nothing more than give teeth to the mandate of the Order. The regulation was thus within the scope of the presidential directive in so implementing it. Under the preceding principles of strong deference to administrative interpretation, we also find that the Department acted within the scope of the Order in applying the Order to NOPSI.

D. Executive and Legislative Action

As indicated earlier, the first strand of NOPSI's argument—namely, the contention that the Government acted without authority in this case—has to do with executive power. Yet that contention ignores the fact of a long-entrenched government program, set in motion and continually kept alive by a series of presidents and approved

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by Congress. The Executive Order program prohibiting employment discrimination by government contractors has been in effect since World War II. President Franklin D. Roosevelt issued the first such Executive Order, and each of his successors has followed suit. *See Contractors Ass'n, supra*, 442 F.2d at 168-71.

Roosevelt's initial prohibition, Executive Order 8802, 3 C.F.R. 957 (1938-1943 Compilation), required a nondiscrimination clause in all defense contracts. Pursuant to a subsequent statute intended to expedite the war effort, Roosevelt issued Executive Order 9001, 3 C.F.R. 1054 (Compilation 1938-1943), which stated that a nondiscrimination clause would be deemed incorporated by reference in all defense contracts covered by the statute. Executive Order 9346, 3 C.F.R. 1280 (1938-1943 Compilation), issued in 1943, required the inclusion of a nondiscrimination clause in all government contracts, not just in defense contracts. However, that Order was still based upon the President's war mobilization powers. *Contractors Ass'n, supra,* 442 F.2d at 169. Executive Orders 8002 and 9346 were continued by President Truman in 1945. Exec. Order No. 9664, 3 C.F.R. 480 (1943-1948 Compilation). Six years later, the President signed an order continuing the provision that a nondiscrimination clause would be deemed incorporated by reference in all defense contracts, Exec. Order No. 10210, 3 C.F.R. 390 (1949-1953 Compilation), and the President, still acting under his war powers, issued another series of Executive Orders extending Executive Order 10210 to additional government agencies, other than the Department of Defense, engaged in defense-related procurement. *Contractors Ass'n, supra,* 442 F.2d at 169. President Eisenhower issued Executive Orders which broadened the contract compliance program, and, significantly, those orders were not issued pursuant to the President's power over defense production. *Id.* at 170. In 1961, President Kennedy issued Executive Order 10925, 3 C.F.R. 448 (1959-1963 Compilation), inserting "affirmative action" language in a nondiscrimination clause required in all government contracts. And President Johnson in 1965 issued Executive Order 11246, transferring to the Secretary of Labor certain compliance functions

previously vested in the President's Committee on Equal Employment Opportunity, and continuing the affirmative action requirement.

Although the Labor Department's federal contract compliance program originated by Executive Order, rather than by legislation, Congress has considered the program on several occasions. At the least, there has been implied congressional approval of the program; it can even be argued that there has been express ratification. The Government correctly identifies three sources of legislative authorization for the Executive Order.

First, the President has express authority over direct federal procurement practices, under 40 U.S.C. § 486(a).[7] While some presidents acted pursuant to their war powers in promulgating Executive Orders concerning employment discrimination by government contractors, the President's broad statutory procurement power has been held to be authorization for other Executive Orders which were not related to war production. *See Contractors Ass'n, supra,* 442 F.2d at 169-71; *Farkas, supra,* 375 F.2d at 632 n.1. Furthermore, more recent decisions involving Executive Order 11246 have candidly acknowledged the validity of the use by the President or Congress of the procurement process to achieve social and

7. That provision authorizes the President to prescribe policies and directives to implement the Federal Property and Administrative Services Act of 1949, which deals with the management (including the procurement) and disposal of government property. Mississippi Power & Light argues that assuming *arguendo* the validity of the Executive Order with respect to the procurement statute, the Order is nonetheless invalid under the Administrative Procedure Act, 5 U.S.C. § 500, *et seq.*, for lack of both publication of the Order and notice of a hearing. Mississippi Power & Light apparently relies on 5 U.S.C. § 553. However, as the Government points out, rules relating to public contracts are expressly excepted from the requirements of that provision. *Id.* § 553(a)(2).

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economic objectives. *See Rossetti Contracting Co.* v. *Brennan,* 7 Cir., 1975, 508 F.2d 1039, 1045 n.18; *Northeast Const. Co.* v. *Romney,* 1973, 157 U.S.App.D.C. 381, 485 F.2d 752, 760. Those cases stand for the proposition that equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the Order.

The second source of legislative authorization is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A reference in the Act, as originally enacted, *id.* § 2000e-8(d), to the Executive Order program indicated congressional intent that the program would continue in existence. *See Contractors Ass'n, supra,* 442 F.2d at 171. This reading of congressional intent is further supported by the decision of Congress at that time not to make Title VII the exclusive federal remedy in this area. *See* 110 Cong.Rec. 13650-52 (1964); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974); *Sanders* v. *Dobbs Houses, Inc.,* 5 Cir., 1970, 431 F.2d 1097, *cert. denied,* 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971).

[6] Third, the debates surrounding the Equal Employment Opportunity Act of 1972, Pub.Law No. 92-261, 86 Stat. 103, which amended Title VII, offer additional evidence of congressional approval. For example, legislative sentiment in support of the Executive Order program surfaced in successful opposition to a renewed attempt to make Title VII the exclusive federal remedy. *See* 118 Cong.Rec. 3371-73 (1972) (remarks of Senator Williams); *id.* at 3962, 3964 (remarks of Senator Javits). Additional support can be inferred from the defeat of a proposal to transfer the program to the Equal Employment Opportunity Commission. *See id.* at 1387-98. Other aspects

of the Act which were enacted into law illustrate congressional contemplation of the program's continuance. *See, e.g.*, 42 U.S.C. §§ 2000e-14, 2000e-17. To be sure, the legislative history does not show, in so many words, congressional ratification of the particular aspect of the Executive Order program here at issue, *viz.*, the imposition by operation of the Order of the nondiscrimination clause on all government contractors, regardless of whether the employers have expressly consented to the clause. However, Congress not only has refused to circumscribe the role of the Office of Federal Contract Compliance in combating employment discrimination, but has indicated a concern for the efficacy of such efforts and an intent that they would continue. The regulation in controversy is an integral part of a long-standing program which Congress has recognized and approved. We have no difficulty, therefore, in finding congressional authorization for the provision.[8] It follows that the applica-

8. NOPSI argues that application of the Executive Order herein contravenes the principle in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in which the Supreme Court held that President Truman's seizure of the steel mills was unlawful. In *Youngstown*, however, Congress had refused to authorize governmental seizure of property as was therein attempted. Therefore, the President had acted in the face of that congressional decision and in the absence of any other power authorizing his action. *See* 343 U.S. at 585-89, 72 S.Ct. at 866-67. The instant case is thus distinguishable, since the Executive acted here pursuant to congressional authorization. The application of the Order today before us falls within the first category of executive power—that of maximum power—which Justice Jackson identified in his concurring opinion in *Youngstown*, 343 U.S. at 635-37, 72 S.Ct. at 870-71; *see Contractors Ass'n, supra*, 442 F.2d at 168-71. Furthermore, the analogy to a seizure is manifestly imprecise.

At oral argument, NOPSI also cited *NAACP* v. *FPC*, 425 U.S. 662, 96 S.Ct. 1806, 48 L.Ed.2d 284 (1976), in which the Supreme Court held that the Federal Power Commission did not have authority under the Federal Power Act and the Natural Gas Act to issue a rule prohibiting discriminatory employment practices by the agency's regulatees. However, *FPC* does not aid appellant's

(Continued on following page)

tion of the Order to NOPSI is also authorized, for such action requires no extension of the regulation's coverage. The regulation incorporating by operation of the Order

Footnote continued—

position. The opinion does not hold that an agency cannot issue regulations concerning affirmative action, assuming the agency has a statutory basis for doing so, nor does it suggest that issuance of such regulations is prohibited unless Congress has authorized the agency to promulgate them. Furthermore, the Court did hold that the FPC indirectly could regulate discriminatory employment practices by its regulatees, to the extent that such practices demonstrably affected a regulatee company's labor costs. *Id.*, 425 U.S. at 666-670, 96 S.Ct. at 1810-11. Therefore, under *FPC*, a government agency can regulate discriminatory employment practices to the extent that such discrimination is related directly to the agency's functions. That principle should be read in light of *Rosetti Contracting* and *Northeast Constr.*, which involve the Executive Order herein and require only a loose relationship between the noneconomic objective, *i.e.*, regulating employment discrimination, and the procurement function. *Rosetti Contracting, supra*, 508 F.2d at 1045 n.18; *Northeast Constr., supra*, 485 F.2d at 760-61. We also note Mississippi Power & Light's citation of *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), apparently to rebut the proposition that Congress ratifies executive orders by subsequently recognizing their existence and making reference to them. However, to the extent that the Supreme Court addressed this issue in *Mow Sun Wong*, the opinion turned on the particular facts in controversy. That case involved, *inter alia*, the question whether acquiescence by the Executive and Congress in a Civil Service Commission policy imposing a citizenship requirement on federal employees was sufficient to give the Commission rule the same support as an express statutory or presidential command. The Court held that neither appropriations acts nor executive orders in which Congress and the President, respectively, had considered the policy and spoken to it in some fashion could fairly be read as evidencing either approval or disapproval of the policy by either branch. *Id.* 426 U.S. at 104-114, 96 S.Ct. at 1906-10. The opinion makes clear, though, that the legislative history and executive orders there in dispute could arguably be taken either way, *i.e.*, they might be read as evidencing either disapproval or approval, and it was that ambiguity which gave rise to the Court's statement. Thus, *Mow Sun Wong* is clearly distinguishable from the case at bar. The legislative history behind the program today before us lacks such ambiguity as dictated the *Mow Sun Wong* result. Furthermore, the cited case lacked the clear directive from the Executive—by Executive Order—which is the very source of the program we confront and uphold herein.

the nondiscrimination clause into every government contract would be a dead letter if the Government could not apply it to a government contractor like NOPSI, merely because the company refused to consent.

Although no circuit has confronted the precise legal issue today before us, we find the *Contractors Ass'n* case to be a very persuasive precedent. There the Third Circuit specifically considered the validity of the Philadelphia Plan, relating to minority hiring in federally-assisted construction projects, which was promulgated pursuant to Executive Order 11246. The court upheld the Plan, on the ground that it was within the implied authority of the President. Insofar as the Philadelphia Plan was instituted to implement the mandate of the Executive Order in a particular geographic area and industry, the court's holding clearly flowed from a view that the Executive Order program itself was valid, at least with respect to federally-assisted construction contracts. Moreover, in language on all fours, the Third Circuit specifically stated that Executive imposition of nondiscrimination contract provisions (including an affirmative action clause) in the Government procurement area is action pursuant to the express or implied authorization of Congress. 442 F.2d at 170.

In response to the argument that a decision for the Government in this case would go beyond the Third Circuit's holding in *Contractors Ass'n*, we believe that our decision today fits within that precedent and, in fact, approves a more confined power than did the *Contractors Ass'n* court. We here impose the nondiscrimination obligation on a company which, as a public utility, holds City-granted franchises and, pursuant thereto, (1) enjoys special economic advantages, including a monopoly, and (2) sells directly to the Government. To so apply the

provision is far easier, in our judgment, than to apply it, as in *Contractors Ass'n*, to a mere bidder for federally-assisted construction project contracts. The ease of application is a function of both the Government's legal power and the utility's economic power in their direct contractual relationship.

E. Contract Law

The second aspect of NOPSI's attack on the Executive Order as herein applied focuses on contract law. The company con-

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tends that its lack of consent to be bound by the nondiscrimination clause distinguishes the prior cases involving the validity of the Order. Whatever, if any, authorization exists for the program is vitiated when, as here, it is imposed on a nonconsenting public utility, the company argues, because the contractual consent principle is violated. We disagree.

We find that the absence of NOPSI's consent to the Executive Order is not determinative, and does not render the prior case law distinguishable. Furthermore, we reject the company's contention that NOPSI is not a government contractor.

[7, 8] Government contracts are different from contracts between ordinary parties. *See M. Steinthal & Co. v. Seamans*, 1971, 147 U.S.App.D.C. 221, 455 F.2d 1289, 1304. *See also Vacketta & Wheeler, A Government Contractor's Right to Abandon Performance*, 65 Geo.L.J. 27 (1976). The Government has the unrestricted power to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. *Perkins v. Lukens Steel Co.*, 310 U.S. 113,

127, 60 S.Ct. 869, 876, 84 L.Ed. 1108 (1940); *Southern Ill. Bldrs. Ass'n* v. *Ogilvie*, S.D.Ill., 1971, 327 F.Supp. 1154, *aff'd*, 471 F.2d 680 (7 Cir., 1972); *cf. King* v. *Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968); *Vacketta & Wheeler, supra.* Agreement to such conditions is unnecessary: where regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties. *M. Steinthal, supra,* at 1304; *J. W. Bateson Co.* v. *United States,* 1963, 162 Ct.Cl. 566, 569; *G. L. Christian, supra,* 312 F.2d at 424; *see Russell Motor Car Co.* v. *United States,* 261 U.S. 514, 43 S.Ct. 428, 67 L.Ed. 778 (1923). *See also De Laval Steam Turbine Co.* v. *United States,* 284 U.S. 61, 52 S.Ct. 78, 76 L.Ed. 168 (1931); *College Point Boat Corp.* v. *United States,* 267 U.S. 12, 45 S.Ct. 199, 69 L.Ed. 490 (1925).[9]

A contractual relationship obviously exists between NOPSI and the Government, notwithstanding the company's attempt to disclaim government-contractor status. This contractual relationship exists by virtue of the fact that the company sells millions of dollars worth of utility services to various agencies of the Federal Government, and has done so for many years. The district court's extensive factual findings as to particular contracts aids us in this determination; however, we would reach it even in the absence of any oral or written agreements to particular terms, because the relationship so clearly reflects a contract.

9. A contract between the Government and one of its contractors need not be in writing in order to be enforceable. *See, e.g., Patten, Government Contracts—Are They Enforceable If Not in Writing?,* 7 Pub. Contract L.J. 232 (1975). Similarly, the applicability of the Executive Order to NOPSI does not depend upon the existence of a formal written contract. We do not say today that no such contract exists between NOPSI and the Government, since resolution of that question is unnecessary to our holding.

Furthermore, we cannot understand how NOPSI seriously can deny status as a government contractor for the reason that it is supplying utility services to the Government pursuant to local franchises which require the company to furnish such energy to all consumers who request it. That the company services customers under local franchises does not negate the obvious fact that NOPSI renders such services to individual customers pursuant to contracts, whether written or parol, and whether explicit or implicit in the parties' course of dealing.

NOPSI's status as a public utility, operating under local franchises granted by the City of New Orleans, and providing services to the United States, renders the utility's express consent unnecessary in light of the Executive Order. Acceptance of the benefits of the local franchises subjected NOPSI to the obligations attached thereto. *Cf. Almeida-Sanchez* v. *United States,* 413 U.S. 266, 271, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973). When NOPSI undertook to satisfy those obligations by selling energy to the

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Government, the company did so according to the terms imposed by the Government.[10]

[9] NOPSI implies, in addition, that because of its public-utility status, imposition of the Executive Order's

10. We are not inferring here any implied or constructive agreement by NOPSI to the terms of the Executive Order. Our holding is dictated by (1) the sale by the company of energy to the Government, *and* (2) the fact that such sale of services was made by a company which, under City franchises, enjoyed a local monopoly in such services needed by the Government. The presence of both those elements triggered the regulation, 41 C.F.R. § 60-1.4(e), and thus, the application of the program's obligations by operation of the Order.

requirements would be unfair. The unfairness, the company suggests, stems from NOPSI's lack of choice as to whether to accept the Government's business. However, the fact that NOSPI is a public utility militates strongly in *favor* of allowing the Government to impose the obligations of the Executive Order on the company. NOPSI's franchises give it a local monopoly in the sale of electricity and a near-monopoly in the sale of natural gas. A monopolistic government supplier, unlike a seller in an ordinary market, has the economic power to resist the Executive Order. In the situation under consideration, the Government needs to buy electric energy in the New Orleans area. If NOPSI were allowed to prevail in its contentions, the Government would have to either acquiesce or else go without necessary services. Obviously, a local utility cannot force such a dilemma upon the Government. Otherwise, a valid and important nationwide federal program, set in place by the President over a third of a century ago, continued by every one of his successors, approved by Congress and applicable to all government contractors, could be nullified by any seller with a monopoly in a service, supply or property needed by the Government, just by virtue of the seller's economic position. Here, NOPSI's monopoly exists only because of local legislative action. The supremacy clause of the Constitution obviously cannot countenance such a result. We hold, therefore, that the Government can compel NOPSI to comply with the equal opportunity obligations of Executive Order 11246, even though the company has not expressly consented to be bound by that Order.

II. NOPSI's Fourth Amendment Contentions

NOPSI next contends that the Executive Order and implementing regulations violate the fourth amendment when applied to a public utility which does not seek to

do business with the Government and has not consented the company's central contention in the case, and is simto the provisions of the Order. This argument parallels ilarly without merit.

Section 202(5) of the Executive Order requires that all covered government contracts include a term whereby the contractor agrees to furnish all information and reports called for by the Order and implementing regulations, and to permit access to its (the contractor's) books and records by the contracting agency and the Secretary of Labor in order to determine whether the contractor is complying with the program. That provision is effectuated by 41 C.F.R. § 60-1.43, requiring that each contractor

> permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order ....

NOPSI contends that enforcement of these provisions herein would constitute an unreasonable search and seizure, in contravention of the rule enunciated in *See* v. *City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). The company's argument ignores the post-*See* development by the Supreme Court of administrative search doctrine, not to mention certain pre-*See* precedents. *See, e.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

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In *See* the Court applied the fourth amendment warrant requirement to commercial as well as residential

premises, in the context of administrative code-enforcement inspections. The Court held only that an unconsented administrative entry upon the nonpublic areas of a commercial premises "may only be compelled through prosecution or physical force within the framework of a warrant procedure." *Id.*, 387 U.S. at 545, 87 S.Ct. at 1740. The *See* Court explicitly pointed out that it did not question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *Id.*, 387 U.S. at 546, 87 S.Ct. at 1741.

The Court drew upon the latter theme in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), recognizing a broad congressional authority to fashion rules concerning the supervision and inspection of the liquor industry, based upon a long history of regulation of that industry. This authority, the Court held, included the power to determine legislatively the standards of reasonableness for searches conducted pursuant to a liquor regulatory system. *Id.*, 397 U.S. at 77, 90 S.Ct. at 777.[11]

The Supreme Court went one step further in *United States* v. *Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), upholding a warrantless search of a firearms dealer under the federal gun control statute. In *Biswell* the Court could not rely on a deep-rooted pattern of federal regulation to justify the inspection system there in contention. However, the Court found that the system could be sustained because "[l]arge interests are at stake, and inspection is a crucial part of the regulatory scheme."

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11. Although the Court in *Colonnade Catering* condemned warrantless entries under the system there in controversy, it is important to note, first, that the decision turned on statutory construction, and second, that the case involved a forecful entry—a situation we do not confront today.

Id., 406 U.S. at 315, 92 S.Ct. at 1596. The same rationale controls the present case. The Government has a vital interest in achieving equal employment opportunity. The Executive Order program is designed to carry out that interest, at least with regard to the Government's own contractors. And some sort of compliance process (including procedures for the inspection of company books and records and for access to company facilities) is necessary in order to make the program work.

[10] The *Biswell* Court, deciding not to use the dealer's submission to the search there at issue as the justification for upholding such a search, declared that "the legality of the search depends not on consent but on the authority of a valid statute." *Id.*, 406 U.S. at 315, 92 S.Ct. at 1596. That reasoning answers NOPSI's argument about lack of consent herein. As we indicated earlier in this opinion, the Executive Order and its implementing regulations have the force and effect of law, were implemented pursuant to statutory procurement authority and have been approved by Congress since being issued. Therefore, they play the same validating role as a statute. Moreover, the *Biswell* decision is premised, to a certain extent, on the idea of implied consent, *i. e.*, that such a regulated dealer, in choosing to engage in a pervasively regulated business and to accept a federal license, did so with the knowledge that it would be subject to inspection. *Id.*, 406 U.S. at 316, 92 S.Ct. at 1596. Obviously, we do not find actual consent to the inspection system at bar. However, there is no policy justification for distinguishing between, on the one hand, a federally-licensed firearms dealer and, on the other, a public utility which, under City-granted franchises, enjoys a local monopoly and sells substantial amounts of energy to the Government, thus bringing the utility within the coverage of the federal contract compliance program. Therefore, we have no difficulty

in applying, for fourth amendment purposes, the implied-consent concept of the cases involving administrative inspection of regulated businessmen, *see, e. g., Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 2538, 37 L.Ed.2d 596 (1973), even

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though that concept is a legal fiction. Our reasoning is consistent with the rule earlier announced in this circuit that where, as here, the Government validly regulates any business, the Government has a right to include in its regulations the requirement that certain records be kept open to official inspection so that the administrative agency can determine whether the company is complying. *See Ray* v. *United States*, 5 Cir., 1967, 374 F.2d 638, 641-42 (*citing* 79 C.J.S. Searches & Seizures § 36, at 803), *cert. denied*, 389 U.S. 833, 88 S.Ct. 35, 19 L.Ed.2d 94 (1967); *cf. Morton Salt, supra; Oklahoma Press, supra.* We note finally that, under the inspection procedure contemplated by the Executive Order program, "the possibilities of abuse and the threat to privacy are not of impressive dimensions," *see Biswell, supra*, 406 U.S. at 317, 92 S.Ct. at 1597, and accordingly, we sustain the program against attack on fourth amendment grounds.[12]

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12. Mississippi Power & Light argues that the Executive Order's provision for Government access to a contractor's books and records is unconstitutional because: (1) the provision is without statutory authorization, and (2) it does not contain a procedure for judicial review. The argument about lack of statutory authorization is without merit in light of the pattern of congressional approval for the Executive Order program which we found in section I of this opinion. The argument about lack of judicial review is also without merit since, in the setting of the instant controversy, it is purely hypothetical. Here there has been no attempt to obtain access by force to the company's records without judicial approval; in fact, there has been ample judicial review in these proceedings of the Government's attempt to conduct a compliance review of NOPSI.

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III. The District Court's Injunctive Order

We turn finally to NOPSI's disagreement with the district court's injunctive order. The company argues that the court lacked jurisdiction to issue that order under which the court retained jurisdiction over this action for the purpose of enforcing the substantive provisions of the Executive Order.

[11] We hold that, the district court having found NOPSI to be covered by the Executive Order, the task of obtaining NOPSI's compliance with the program should be left to the Government's own administrative compliance processes. Accordingly, we modify that part of the district court's opinion which retained jurisdiction over this suit and which dictated a mandate of injunction clearly contemplating substantive enforcement of the Executive Order. Our decision is based on equitable considerations, and should not be read as holding that the district court lacked jurisdiction in any respect for its ruling. Resolution of NOPSI's objections to the court's injunctive order

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Footnote continued—

Since oral argument, Mississippi Power & Light has called our attention to *Brennan* v. *Gibson's Products, Inc.*, E.D.Tex., 1976, 407 F.Supp. 154, *appeal docketed*, No. 76-1526 (5 Cir. Feb. 27, 1976), a case in which a three-judge court held that an attempt by Department of Labor officials to conduct a warrantless inspection of a business, pursuant to the Occupational Safety and Health Act of 1970, violated the fourth amendment. However, *Gibson's Products* does not deter us from the conclusion we have reached. As the three-judge court pointed out, the company involved there was not licensed and had no history of close regulation, and the statutory provisions which appeared to authorize the search were not limited to such businesses, but instead embraced "the whole spectrum of unrelated and disparate activities which compose private enterprise in the United States." *Id.*, 407 F.Supp. at 161-62. Furthermore, there was no reason to believe that the thing sought to be controlled by the regulatory system before the court existed in the area to be searched. *Id.* at 162. Therefore, *Gibson's Products* is manifestly distinguishable from both the instant case and those cases upon which we have relied.

is therefore unnecessary to our holding; however, we proceed to dismiss all of the company's present objections in order that they may not be interposed again as obstacles to enforcement of the program herein.

NOPSI makes two major arguments in this regard. The first is that the Government has failed to follow the procedural requirements of the Executive Order and implementing regulations. NOPSI alleges that the Government was required to proceed by conciliation and persuasion, but instead chose to pursue litigation in its compliance strategy. In addition, NOPSI contends that the Government has failed to

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afford the company a hearing mandated under the program. In support of these assertions, NOPSI relies on a number of regulatory provisions. We need not respond to each assertion specifically, in view of the fact that the Government's attempts to conduct a voluntary compliance review of NOPSI date back to 1969.

The regulations now in effect[13] provide for the institution of administrative *or* judicial enforcement proceedings in response to violations of the Executive Order. Violations may be found, based upon, *inter alia*,

> (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations . . . or (vii) any substantial or material violation or the threat of [such] a . . . violation of the contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

13. *See* note 5 *supra*.

41 C.F.R. § 60-1.26(a)(1). The district court found such a violation. The regulations further provide that whenever the Director of the Office of Federal Contract Compliance has reason to believe that there exists the threat or fact of violation of the Order or regulations, the Director

> may institute administrative enforcement proceedings . . . or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief . . . and to seek such additional relief, including back pay, as may be appropriate. *There are no procedural prerequisites to a referral to the Department of Justice* by the Director, and *such referrals may be accomplished without proceeding through the conciliation procedures* in this chapter, *and a referral may be made at any stage in the procedures* under this chapter.

Id. § 60-1.26(a)(2) (emphasis added).

[12] The preceding regulation plainly rebuts NOPSI's first contention.[14] And the regulation also refutes NOPSI's second major assertion, which is that the Justice Department cannot bring judicial proceedings to enforce the provisions of the Executive Order until the OFCC or the compliance agency (here the General Services Administration) has first exhausted the administrative pro-

14. As to NOPSI's argument that the Government was required to proceed by conciliation and persuasion, we think that the facts described at the outset of our opinion indicate that such efforts took place. In addition, we find no conflict between 41 C.F.R. § 60-1.26(a)(2) and section 209(b) of the Executive Order. While section 209(b) directs the contracting agency to make reasonable efforts to achieve compliance by conciliation and persuasion, those efforts are to be made pursuant to the regulations issued by the Secretary of Labor. *Id.* Thus, section 60-1.26(a)(2) qualifies the Government's responsibilities under section 209(b) of the Order, rather than vice versa, and the two provisions can be read consistently.

cedures of the program. Two more observations are in order as to the exhaustion argument. First, the cases cited by NOPSI in support of that contention involve private actions and are, therefore, inapposite to the situation where the Government itself has decided to pursue judicial litigation in enforcing Executive Order 11246.[15] Second, while we recognize that, as NOPSI argues, substantial arguments can be mustered for application of the exhaustion doctrine, we nevertheless have no reason to read an exhaustion requirement into a program which clearly and deliberately provides judicial enforcement as an alternative to administrative enforcement, and which explicitly rejects procedural prerequisites to judicial enforcement.

[13] Despite our conclusion that the district court had both the jurisdiction and the power to direct by injunctive order NOPSI's compliance, we conclude that the enforcement function in this case would be better carried out administratively by the compliance agencies. This decision is

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reached in the exercise of our equitable discretion, for "the manner, means and method for resolving" this dispute must be devised under "inherent equitable principles." *R. L. Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1367.[16] In light of our holding

15. For example, to the extent that the exhaustion argument is rooted in notions of deference to the administrative process and the administrative agency, the argument has no bearing in the instant context.

16. *Johnson* is one of the cases cited by the Government for the proposition that the district court's retention of jurisdiction and injunctive order were justified. While those cases indicate that the district court had the authority to take the action which it took—a conclusion we do not dispute—they in no way suggest that the district court's injunctive order was required in the circumstances before us. Since we have concluded that our remedial tack will best effectuate the Executive Order, discussion of those cases is unnecessary.

that NOPSI is covered by the Executive Order and has violated it, our primary mission at this point, of course, is to render such relief as is necessary and appropriate to effectuate the mandate of the Executive Order as fully and expeditiously as possible. However, the relief imposed should not "run against the grain of fundamental fairness which should hopefully be the outcome of any equitable decree." *Id.* at 1379. In the particular setting of this case, where NOPSI has never agreed to be bound by the Order, we believe that fundamental fairness requires that the Government, armed this time with this court's opinion, now obtain the company's voluntary compliance before calling for the support of our injunctive powers.

Other equitable factors support this result. The basic approach of the Executive Order program, as implemented, is enforcement by Executive agencies, in particular the Department of Labor, even though the Order itself provides the judicial enforcement alternative in section 209 (a)(2). The Executive has expertise, which this court lacks, in the administration of the program, and that expertise can profitably be brought to bear on the problem at bar. Further, we see no reason to burden our scarce judicial resources with the task of supervising the enforcement of the federal contract compliance program, unless such judicial enforcement becomes necessary.

[14] Our decision today is not an invitation to further delay by NOPSI in complying with the Executive Order. Such delay would be intolerable. In its brief, NOPSI states:

> If a court of final appellant (sic) resort upholds the District Court determination that NOPSI is a government contractor notwithstanding its refusal to consent to the contractual equal opportunity provisions

> of Executive Order 11246, the General Services Administration and OFCC should then be afforded the opportunity to work with NOPSI in developing an appropriate affirmative action program, if indeed one is found necessary . . .

Brief for Appellant at 46-47.[17] That statement underlies the remedial approach which we today require. We assume, based on the quoted passage, NOPSI's good faith in complying with the Order, given our holding that the company is covered by it.

To restate our decision, then, the appropriate government compliance agency—whether OFCC or GSA—may proceed by administrative action to obtain NOPSI's compliance with the Executive Order. Though we are removing the injunctive mandate of the district court, our decision contemplates good faith negotiations between the parties, and certain issues decided herein are precluded from further negotiation. The company cannot any longer dispute its coverage under the Executive Order, nor can the company attempt to nullify the effect of the Order's application by demanding limitation-of-scope language in any contract or proposed affirmative action program that would restrict the impact of the Order. Moreover, NOPSI has no valid fourth amendment objections to the Government's demands for access either to the company's facilities or to the company's

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books and records, nor can NOPSI further delay or resist compliance by insisting on merely technical or unnecessary procedural niceties.

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17. NOPSI's statement suggests the possibility that an affirmative action program might not be found necessary. We read the regulations, however, to require a written affirmative action program. *See* 41 C.F.R. § 60-1.40(a).

The Government may proceed at once in enforcing the Executive Order by administrative action. The parties are advised that, having fashioned our relief on the assumption of NOPSI's good faith in complying with our decision herein, this court will look with disfavor on any future attempts to delay compliance.

MODIFIED AND AFFIRMED.

CLARK, Circuit Judge, dissenting:

The decisive question in both this case and *United States* v. *Mississippi Power & Light Co.*, 553 F.2d 480 (5th Cir. 1977), which we also decide today, is whether the federal government may impose a substantial contract obligation on a public utility simply because that utility supplies energy to federal installations as required by state law and the terms of its state or municipal franchise. The majority answers in the affirmative. I respectfully disagree.

I.

In order to determine whether New Orleans Public Service, Inc. [NOPSI], or Mississippi Power & Light Co. [MP&L] must comply with a comprehensive equal opportunity clause despite their explicit refusals to subject themselves to it, three issues must be resolved. First, was the issuance of the Executive Order which requires the clause be included in every federal contract a valid exercise of Presidential power? Second, what relation must exist between a person and the federal government before that person is subject to the dictates of the equal opportunity clause by operation of the Executive Order? And third, does the requisite relation exist between the federal government and either NOPSI or MP&L. Since the resolution of the second and third issues furnishes a suf-

ficient ground for my decision of this case, I do not reach the constitutional puzzles presented by the first.[1]

The relation that must exist between a person and the federal government before that person is bound by the equal opportunity clause by operation of the Executive Order is defined by the text of the Order itself. Like its predecessors, Executive Order No. 11246[2] is not all inclusive. It was promulgated to discourage only certain classes of persons who do business with the federal government from engaging in discriminatory employment practices. The Order directs all federal contracting agencies to include the equal opportunity clause in virtually every "Government contract" consummated after October 24, 1965.[3] The first provision of the clause commands the "contractor" to refrain from discrimination, and to take affirmative action to ensure non-discrimination in recruiting, hiring, promoting, and discharging his employees during the performance of his government contract.[4] Other provisions require that he perform related tasks, such as filing reports describing his employment practices and including the clause in each of his subcontracts. On its face, then, the Executive Order extends the obligation to comply with the terms of the equal opportunity clause only to those who (1) have been awarded a federal government contract, (2) after the effective date of the Order,

1. For the purposes of this dissent, I make two assumptions. The first is that the Executive Order is valid and possesses the force and effect of law. The second is that the Secretary of Labor did not exceed the rulemaking authority granted him by the Executive Order when he issued 41 C.F.R. § 60-1.4(e) (1976), *as amended*, 42 Fed.Reg. 3454, 3459 (1977), which incorporates the equal opportunity clause into all non-exempt government contracts by operation of the Executive Order.

2. 3 C.F.R. 169 (1974).

3. *Id.* §§ 202 & 405.

4. *Id.* § 202.

and (3) have not yet fully performed their contractual commitments.[5]

[553 F.2d 476]

Although the Executive Order does not explicitly define the term "government contract," there is nothing in its language which suggests that anything less than a contractual relation—as those words are commonly understood in the law—between a person and the federal government was intended to suffice for coverage. The word "contract" is an unambiguous legal term of art connoting an enforceable promise or set of promises between mutually consenting parties. Turning to the "executive history" of the Order or to the Secretary's implementing regulations to vary this unambiguous meaning would be unjustifiable. "[W]here the words are plain there is no room for construction." *Osaka Shoshen Kaisha Line* v. *United States*, 300 U.S. 98, 101, 57 S.Ct. 356, 357, 81 L.Ed. 532 (1937), *quoted in*, *Hodgson* v. *Mauldin*, 344 F.Supp. 302, 307 (N.D. Ala.1972), *aff'd*, 478 F.2d 702 (5th Cir. 1973); *Souder* v. *Brennan*, 367 F.Supp. 808, 812 (D.D.C.1973). Although both of these cases involved the interpretation of a statute rather than an executive order, there is no reason why the canons of construction should not be the same.

The regulations promulgated by the Secretary pursuant to his authority to issue such rules as he deems necessary to accomplish the purpose of the Executive Order,[6] however, might be read as taking a broader view of the meaning of the word "contract" as it is used in the Execu-

5. While the Executive Order also imposes obligations on other classes of individuals, such as persons bidding for a government contract, the scope of those obligations is determined by subsequent sections of the Order itself rather than by the equal opportunity clause.

6. 3 C.F.R. 169, § 201 (1974).

tive Order. 41 C.F.R. § 60-1.3 (1976), *as amended*, 42 Fed. Reg. 3454, 3458 (1977), provides:

> "Government Contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services," as used in this section includes, but is not limited to the following services,
>
> Utility . . .
>
> "Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extension.

Since regulations issued pursuant to a valid executive order stand on no better footing than regulations issued pursuant to a statute, it follows that the Secretary's regulations possess the force and effect of law only if they are "(a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable." 1 K. Davis, Administrative Law Treatise § 5.03, p. 299 (1958) & § 29.01-1, p. 654 (Supp.1976). The Executive Order requires the presence of the equal opportunity clause only in contracts. If the term "agreement" used in Section 60-1.3 was intended to be more inclusive it would be void since it would exceed the scope of the Secretary's rulemaking authority. As the Supreme Court recently stated:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'"

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185, 213, 96 S.Ct. 1375, 1391, 47 L.Ed.2d 668, 688 (1976), *quoting Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134, 56 S.Ct. 397, 399, 80 L.Ed. 528, 531 (1936). The same principle is applicable here.

Moreover, even if the Executive Order could be read to cover parties to unenforceable agreements or non-contracts, the federal government's position would not be measurably advanced. The Executive Order merely requires contracting agencies to include the equal opportunity clause in their bid lettings and contracts. The supplementary regulation, Section 60-1.4(e), provides only that the clause is in the contract whether or not the agency remembered to

[553 F.2d 477]

put it there. Therefore, it is necessary that an enforceable contract exist between a person and the government if there is to be a basis for the enforcement of the clause. If the clause were placed in a void agreement, it would fail with the rest.

NOPSI and MP&L are public utility companies. Although their arrangements with their respective regulatory authorities are not identical in form,[7] the effect is the same. Because they hold franchises granted by a state or a city, are engaged in an enterprise affected with the public interest, and hold themselves out as being willing to serve all members of the public, both NOPSI and MP&L have a duty to provide the types of energy they distribute to anyone within their certificated area who requests it

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7. NOPSI supplies electricity and natural gas to residents of New Orleans pursuant to an indeterminate permit issued by the New Orleans City Council in 1922. MP&L operates under a franchise granted to it by the Mississippi Public Service Commission in 1956.

and complies with reasonable conditions of service. *Morehouse Natural Gas Co.* v. *Louisiana Public Service Commission,* 242 La. 985, 999-1000, 140 So.2d 646, 651 (1962); *Capital Electric Power Association* v. *Mississippi Power & Light Co.,* Miss., 218 So.2d 707, 713 (1968). In exchange, they receive the right, to some extent exclusively, to supply utility service to customers within their certificated area at a price set by their regulatory authority, and they are guaranteed a reasonable rate of return on their investment.

Since the majority has described the history of NOPSI's interaction with the federal government, only brief recap is necessary here. NOPSI has furnished federal installations with utility service for more than fifty years. In *United States* v. *New Orleans Public Service, Inc.,* 8 FEP 1089, 8 EPD 9795 (E.D.La.1974), the court found that NOPSI currently supplied twenty-two federal facilities with electricity, natural gas, or both. In some instances there is a written agreement between NOPSI and the federal government concerning essential terms, such as the applicable rate and volume of service demanded, while in others the understanding is unwritten. Although most of these arrangements pre-date the Executive Order, a few were entered into after it became effective. The price term of every agreement was changed as recently as 1973, when the New Orleans City Council revised NOPSI's rate schedule, and on at least one occasion since the issuance of the Order the government requested and received additional service at one of its locations. Recently, when NASA insisted that its proposed written agreement with NOPSI contain the equal opportunity clause NOPSI refused to capitulate. Instead, NOPSI informed NASA it would continue to supply NASA's energy requirements at the regulated price as both its franchise and Louisiana law require,

but expressly refused to subject itself to the equal opportunity clause.[8]

Government contracts do differ from contracts between private parties in some respects, *see* J. Paul, United States Government-Contracts and Subcontracts 69-75 (1964), but no such difference affects the result here. Although contracts of the United States are governed by federal law, *United States* v. *Seckinger,* 397 U.S. 203, 210, 90 S.Ct. 880, 884, 25 L.Ed.2d 224, 232 (1970), "[i]t is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law." *Priebe & Sons, Inc.* v. *United States,* 332 U.S. 407, 410-412, 68 S.Ct. 123, 125-26, 92 L.Ed. 32, 37-38 (1947), *quoted in, Security Life & Accident Insurance Co.* v. *United States,* 357 F.2d 145, 148 (5th Cir. 1966). One of the most fundamental of those principles is that to be enforceable, a contract

must be supported by valid consideration. *Estate of Bogley* v. *United States,* 514 F.2d 1027, 1033, Ct.Cl. (1976); 1 S. Williston, Contracts § 99, p. 367 (3d ed. 1957); 1A A. Corbin, Contracts § 114, p. 498 (1963). There is no reason why this rule should not apply to contracts with the federal government; at least one court has assumed that it does. *See United States* v. *Marchetti,* 466 F.2d 1309, 1317 n. 6 (4th Cir.), *cert. denied,* 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972).

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8. Since MP&L interaction with the federal government contains the same essential elements—written and unwritten arrangements for service consummated before and after the issuance of the Order, changes in the rate applicable to the government since 1965, and an express refusal to be bound by the equal opportunity clause—MP&L stands in the same posture as NOPSI, and I shall not needlessly prolong this dissent by recounting its course of dealing in detail.

A promise to perform a service which one is under a pre-existing legal obligation to perform is not valid consideration for a return promise. *United States* v. *Bridgeman*, 173 U.S.App.D.C. 150, 523 F.2d 1099, 1110 (1975), *cert. denied*, 425 U.S. 961, 96 S.Ct. 1744, 48 L.Ed.2d 206 (1976); 1 S. Williston, *supra*, § 132, p. 557; 1A A. Corbin, *supra*, § 171, p. 105. Nor is it merely the return promise that is unenforceable. Because the return promise is unenforceable, there is no mutuality of obligation and therefore no contract is ever formed. Of course, in the event that the party subject to the pre-existing obligation does more than his duty requires, he creates consideration sufficient to support the return promise. 1 S. Williston, *supra*, § 132, pp. 558-59; 1A A. Corbin, *supra*, § 192, p. 180.

The application of these principles to the facts of this case is straightforward. Since both NOPSI and MP&L have a pre-existing legal obligation to supply utility service to the federal installations within their certificated area at the applicable rate irrespective of their agreement to do so, their arrangements with the federal government were instances of performance of their duty to serve customers, not contracts with the federal government. Moreover, an examination of the record reveals that none of the agreements between the utilities and the federal government purported to bind either utility to treat the government any differently from the way state law obliged it to treat other customers of equal size. Therefore, neither utility is a government contractor within the meaning of the Executive Order, and neither has an enforceable obligation to comply with the equal opportunity clause.

The majority takes the position that by accepting their franchises, NOPSI and MP&L assumed an obligation to furnish the federal government with energy on whatever terms it might wish to impose, including a requirement that they comply with the provisions of the equal opportunity clause. But there is nothing in the record which supports the notion that either the utilities or their respective regulatory authorities were aware that NOPSI and MP&L were undertaking such an obligation at the time the franchise agreements were executed. And since the franchises were agreements with a state or city rather than the federal government, no such obligation can be implied as a matter of law under Section 60-1.4(e) of the regulations. In addition, both utilities accepted their franchises long before Executive Order 11246 was issued. To impose the burden of complying with the equal opportunity clause on them because of actions pre-dating the Order would be inconsistent with Sections 202 & 405 which indicate that the order is triggered only by actions taken after October 24, 1965.

The majority also suggests that because NOPSI and MP&L are public utilities it is justifiable to saddle them with the record keeping, expense, and other burdens that compliance with the equal opportunity clause entails. It contends that to permit them to use their position as the sole sources of energy within their certificated areas to force the federal government to choose between bargaining over the inclusion of the clause and doing without energy, would be inconsistent with the Supremacy Clause.[9] The premise of this argument is that the utilities' economic leverage is the result of state action, because purely private action cannot violate the Supremacy Clause. This premise is not supported by the record.

[553 F.2d 479]

As the Supreme Court recognized in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 n. 8, 95 S.Ct. 449,

9. U.S.Const., Art. VI, cl. 2.

454, 42 L.Ed.2d 477, 484 (1974), where it held that a public utility's termination of service to a customer did not constitute state action for Fourteenth Amendment purposes, "public utility companies are natural monopolies created by the economic forces of high threshold capital requirements and virtually unlimited economy of scale." *See* 2 A. Kahn, The Economics of Regulation: Principles and Institutions 119-126 (1971). It is therefore unlikely that NOPSI or MP&L faced any greater competition at the time they accepted their franchises than they do today, and there is nothing in the record to show that they did. If they did not, then by granting them franchises their respective regulatory authorities did little more than acknowledge their pre-existing positions as the sole suppliers of energy within their certificated areas. It appears that the laws of economics rather than those of a state made it possible for NOPSI and MP&L to amass the leverage they possess.

The facts of this case present no conflict between the franchises and the Executive Order. The franchises were created to ensure what a dependable supply of energy would be available to inhabitants of New Orleans and Mississippi at a regulated price. Here, the federal government has availed itself of the benefits of this policy by requiring the utilities to supply it with service under and in accordance with the terms of their franchises, just as any other inhabitant might do. The validity of the franchises and the purposes they are intended to serve have not been challenged, but rather affirmed. This is not a case in which a regulatory authority or a franchise holder has invoked a franchise to bar the United States from generating its own energy or from contracting with someone other than the franchise holder as a source of supply. Nor has the United States shown that it is impossible for energy to be otherwise obtained. At most the government

suggests that the franchise holders operating under the terms of their franchises are the cheapest sources of energy within their certificated areas. Even the government cannot have the best of all worlds: low-priced energy and a contract vehicle for making the equal opportunity clause enforceable.

II.

Had the court adopted the position of this dissent, the effectiveness of the Executive Order as a tool for eliminating discrimination in employment would not have been destroyed. The vast majority of those supplying goods and services to the federal government are not under a pre-existing legal obligation to do so, but rather are contractors within the meaning of the Order. Nothing said here would affect the applicability of the provisions of the equal opportunity clause to them. Nor would such a decision leave public utilities at liberty to treat their employees as they pleased. There are a plethora of state and federal measures designed to eliminate discriminatory employment practices to which they are subject.

I do not dissent to defend discriminatory employment practices. But when the government has chosen to attack them through the mechanism of inserting a nondiscrimination clause in its contracts rather than by enacting a statute, there are limits to what it can accomplish. Those limits have been exceeded here. The majority makes a mistake when it allows the government to forge ahead to a desirable end by means that stand the law of contracts on its head.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES

v.

MISSISSIPPI POWER & LIGHT COMPANY
NO. J74-160(R)

APRIL 22, 1975

DAN M. RUSSELL, Jr., Chief Judge:—The United States of America has brought this action against the Mississippi Power and Light Company (MP & L), a Mississippi corporation with its principal place of business in Jackson, Mississippi, to enforce the contractual obligations imposed by Executive Order No. 11246 (30 F.R. 12319), as amended by Executive Order 11375 (32 F.R. 14303), referred to herein as Executive Order No. 11246.

The government claims jurisdiction by virtue of 28 U.S.C. #1345, whereby any suit in which the United States is a plaintiff shall be brought in the district courts.

MP & L is a public utility franchised by the Mississippi Public Service Commission to supply electricity in a large part of the western half of the state, including the cities of Jackson, Clarksdale, Senatobia, Grenada, McComb, Natchez, and Vicksburg. MP & L is the primary supplier of electricity in this part of the state, and by virtue of its franchise must supply electricity to anyone requesting same, including the United States and any of its government agencies.

[SECTION 201]

Section 201 of the Executive Order 11246 vests primary responsibility for administration of Part II of the

order entitled "Nondiscrimination in Employment by Government Contractors and Subcontractors" in the U.S. Secretary of Labor, hereinafter referred to as Secretary. Additionally, Section 201 empowers the Secretary to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purpose" of Executive Order 11246. The secretary has promulgated implementing regulations which are published in Title 41, Code of Federal Regulations, Part 60, 41 C.F.R. 60-1, et seq.

Inasmuch as MP & L currently supplies electrical utility service to various federal agencies in Mississippi, including the General Service Administration (GSA), valued at over $100,000.00 per year, the government claims that MP & L is a contractor within the meaning of 41 C.F.R. 60, subject to all contractual obligations imposed on government contractors by Executive Order 11246 and the implementing regulations.

This Order and 41 C.F.R. 60-1.4 (a) require that specified equal opportunity provisions, hereinafter referred to as the equal opportunity[1] clause, be placed in all government contracts, and modifications if not included in the

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1. The provisions are as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin.

(4) The contractor will comply with all provisions of Executive Order No. 11246 . . . . and of the rules, regulations and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 . . . . and by the rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts . . . . for the purposes of investigation to ascertain compliance with such rules, regulations and orders.

original contracts, and 41 C.F.R. 60-1.4 (e) requires that, by operation of the order, the equal opportunity clause shall be considered to be a part of every contract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts, and, further, the clause may also be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor. The clause provides that the contractor will furnish all information and reports required by Executive Order 11246 and by the rules, regulations and orders of the Secretary, and will permit access to his books, records and accounts by the contracting agency and the Secretary for purposes of investigation to ascertain compliance with such rules, regulations and orders.

The government avers that MP & L has not received an exemption from the coverage of Executive Order 11246 from the Office of Federal Contract Compliance of the Department of Labor (OFCC) or from any other authorized federal compliance review agency in the Jackson, Vicksburg and Greenville areas to which MP&L supplies electrical service.

[GOVERNMENT ALLEGATIONS]

The government alleges that, since March 31, 1972, MP & L has refused GSA access to conduct a compliance review on the grounds that there is no current contract between MP & L and any federal agency in which MP & L has agreed to be subject to Executive Order 11246; that MP & L has refused to adopt and implement an affirmative action plan as required by Executive Order 11246; that on October 10, 1973, the Director of OFCC found that government contracts exist between MP & L and various federal agencies, including GSA; that the equal opportunity

clause mandated by Executive Order 11246 is applicable to such contracts; and that, despite the Director's finding, MP & L has continued to refuse GSA access to conduct a compliance review and has failed and refused to comply with other obligations imposed upon it by Executive Order 11246 and the rules and regulations issued pursuant thereto.

The government seeks injunctive relief to secure to GSA the right to go upon defendant's premises for an on-site inspection and for an examination of defendant's books, records and accounts, and to enjoin MP & L from refusing to comply with the other terms and conditions imposed by Executive Order 11246 and the implementing regulations.

MP & L has answered denying that it has a contract which imposes upon it any obligation under Executive Order 11246 and denying that the equal opportunity clause mandated by Executive Order 11246 may be incorporated by reference by the Director of OFCC into "any federal contract" which he so designates. The defendant, while admitting that it has an affirmative action plan, also admits it has not adopted such a plan pursuant to Executive Order 11246, and admits that it has not permitted GSA access to its premises or its books, records and accounts. Affirmatively, MP & L charges that the complaint fails to state a claim for which relief can be granted and that the government has no standing to sue on a number of grounds: (1) the litigation is not authorized under Executive Order 11246 or any other applicable law; (2) the issuance of Executive Order No. 11246 exceeded the authority delegated to the President by the Congress in Federal Property and Administrative Service Act in that the Congress did not delegate to the President the authority to override the substantive law of contracts; (3) the Sec-

retary exceeded the authority delegated to him when he promulgated regulations incorporating in the government contracts the equal opportunity clause by reference and by operation of the order, and that said provisions are not "within the limitations of applicable law" as provided in Section 209 of Executive Order 11246 but are in derogation of the common law, federal common law and state laws with respect to the law of contracts; (4) the fact that MP & L provides electrical service to various federal agencies is not a contract such as was intended for the purpose of implementing Executive Order 11246; and (5) nor is MP & L's agreement to provide electrical services within the definition of "government contract" as defined in 41 C.F.R. 60-1.3 (m). The defendant amended its answer to aver (1) that the Director of OFCC failed to follow the procedures set forth in 41 C.F.R. 60-2.2 (c) (Revised Order #4) by not giving defendant notice to show cause why enforcement proceedings should not be brought against it; (2) 41 C.F.R. 60.1.4 (d), the incorporation by reference clause, is inapplicable because the Director of OFCC has never "designated" the services rendered by MP & L as a contract subject to the equal opportunity clause incorporated by reference; and (3) Section 202 (a) of Executive Order 11246 and the implementing regulations which permit access to the premises and access to defendant's books, records and accounts are in violation of defendant's 4th Amendment right to be free from unreasonable searches and seizures.

[PROTECTIVE ORDERS]

Shortly after the filing of the complaint and answer, the government directed 131 interrogatories, with subparts, to defendant and requests for production of documents in 45 categories. Defendant sought and obtained a protective

order suspending discovery until such time as the Court ruled upon defendant's motion for summary judgment.

Actually defendant moved for a judgment on the pleadings under Rule 12 (b) (6), F.R.C.P. on the grounds set out in its answer as amended, following which the government moved for a partial summary judgment to the extent that MP & L be declared a government contractor within the meaning of Executive Order 11246 and be required to comply with the Executive Order and its implementing rules and regulations.

Both motions have been argued to the Court and comprehensive briefs have been filed.

No supporting documents accompanied defendant's motion for a judgment on the pleadings; however, the government has filed in support of its motion an affidavit of counsel assigned to this case to which are attached copies of two contracts between GSA and MP & L for electrical service to the United States Post Office and Courthouse at Jackson and Vicksburg, respectively, up to and including current rate changes. The affiant, on information and belief, stated that each contract was for utility service at a value in excess of $10,000.00 per year, at least since 1965; that the total value has exceeded $50,000.00 since the fiscal year of 1973; and that MP & L has never received an exemption from OFCC or any other federal agency from the coverage of Executive Order 11246 and the rules and regulations issued pursuant thereto. The government also offered another affidavit of counsel assigned to this case to which are appended copies of the following documents:

(a) A June 25, 1970 letter from R. F. Carroll, Jr. of GSA to R. B. Wilson of MP & L informing MP & L that GSA had been assigned contract compliance responsibility for MP & L.

(b) A March 28, 1972 letter from J. C. Pollock, Jr. of GSA to C. L. Stephenson of MP & L informing MP & L that GSA intended to conduct a compliance review of MP & L on April 5, 1972.

(c) A March 31, 1972 letter from C. L. Stephenson of MP & L to W. C. Edison of GSA informing GSA that MP & L did not consider itself to be subject to Executive Order 11246.

(d) A March 19, 1973 letter from C. L. Stephenson of MP & L to Peggy McGintry of GSA again informing GSA that MP & L did not consider itself subject to Executive Order 11246.

(e) A May 7, 1973 letter from E. E. Mitchell, Director of Civil Rights for GSA, to Philip Davis, Acting Director of OFCC, referring MP & L's refusal to comply with Executive Order 11246 to OFCC, and requesting OFCC under its jurisdiction to invoke the available sanctions, including referral to the Justice Department.

(f) An October 10, 1973 letter from Philip Davis, Director of OFCC to C. Lamar Stephenson of MP & L, advising that MP & L's agreements with GSA for electrical service to the Federal Buildings at Jackson and Vicksburg are within the purview of Executive Order 11246 and its implementing regulations and that MP & L must comply with the order and regulations providing GSA officers with access to the premises of MP & L and providing such officers with access to books, records and accounts for the purpose of conducting a compliance review and determining MP & L's compliance with the Order and implementing rules, regulations and orders. The letter further notified MP & L that it would be contacted shortly by a GSA compliance officer.

(g) An October 10, 1973 letter from Philip J. Davis, Director of OFCC, to E. E. Mitchell of GSA, transmitting a copy of Davis' letter to MP & L.

(h) An October 24, 1973 GSA internal memorandum from J. C. Pollock, Jr., regarding the attempted scheduling of a compliance review of MP & L.

(i) An October 26, 1973, letter from C. Lamar Stephenson of MP & L to Philip J. Davis, Director of OFCC, with a copy to John Pollock of GSA, advising Davis that MP & L had an affirmative action program, an Equal Opportunity Officer, and an aggressive minorities and female recruiting program, all on a voluntary basis, and again advising that MP & L had never expressly or impliedly, nor orally or in writing, agreed to comply with the terms of Executive Order 11246 or its implementing regulations, and denying that the government, as a matter of law, can unilaterally insert the equal employment opportunity clause in to its contracts.

[ADDITIONAL DOCUMENTS]

The affidavit also refers to attached copies of additional documents pertaining to MP & L-GSA written contracts for utility service in Jackson and Vicksburg, including a utility service contract dated July 20, 1959, for the supply of electricity to the Peoples-Newman Building in Vicksburg, with rates changes to date, the original contract containing a nondiscrimination in employment provision, and a provision whereby MP & L agreed for the Comptroller General of the U.S. or his authorized agents to have access to company "books, documents, papers and records" involving "transactions related to this contract."

A third affidavit, by government's counsel in support of the government's motion for partial summary judgment and

in opposition to defendant's motion for judgment on the pleadings, filed subsequent to a hearing on the motions is to the effect that, in 1972, GSA atempted to negotiate a formal written electrical service contract with MP & L for the U.S. Post Office and Courthouse in Greenville, Mississippi. The proposed contract contained, inter alia, the equal opportunity clause as set forth in Executive Order 11246, a provision for the examination of MP & L's records for a period of 3 years after final payment as required by Federal Procurement Regulation 41 C.F.R. Part 1-20, and a provision requiring MP & L to certify that it had no segregated facilities. Cecil Burford of MP & L in a letter dated October 25, 1972 to William Hall of GSA returned the proposed contract unsigned, MP & L substituting in lieu thereof its "Agreement for Service" which did not contain the equal opportunity clause or a provision for access to MP & L's records as required by Executive Order 11246, or a certification that MP & L's facilities were not segregated. Copies of the unsigned proposed GSA contract, Burford's letter and MP & L's agreement for services were attached to the affidavit. The affiant further stated that since at least 1966 the value of electrical service provided by MP & L to GSA at the U.S. Post Office and Courthouse at Greenville has exceeded the sum of $10,000.00.

MP & L has not responded on the record to the government's motion for a partial summary judgment and apparently does not contest the authenticity and existence of the above referred to documents. It has by proposed findings of fact and conclusions of law, filed with the Court, admitted that Executive Order 11246 in Section 202 provides that all parties contracting with the government shall agree to the conditions of the equal opportunity clause including an affirmative action program and admits that MP & L has

written and unwritten agreements to furnish electrical services to various federal agencies at 15 government facilities in dollar amounts above $10,000.00, including the Post Office and Courtroom facilities at Jackson, Vicksburg, and Greenville, and the Peoples-Newman Building at Vicksburg.[2] In its brief, MP & L simply says that, as a matter of law, the federal government has failed to state a cause

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2. 1. General Services Administration
305 Main Street
Greenville, Mississippi

2. U. S. Construction Casting Plant
Greenville, Mississippi

3. Department of Agriculture Research Center
Stoneville, Mississippi

4. U. S. Cotton Gin Lab
Stoneville, Mississippi

5. Post Office
Grenada, Mississippi

6. U. S. Post Office
Highway 80 West
Jackson, Mississippi

7. Veterans Administration Hospital
Jackson, Mississippi

8. U. S. Post Office
Capitol Street
Jackson, Mississippi

9. U. S. Waterways Experiment Station
Jackson, Mississippi

10. U. S. Government Construction Division
Harbor Project
Vicksburg, Mississippi

11. U. S. Post Office
Vicksburg, Mississippi

12. Peoples Newman Building
General Services Administration
Vicksburg, Mississippi

13. General Services Administration
1400 Walnut Street
Vicksburg, Mississippi

14. U. S. Waterways Experiment Station
Vicksburg, Mississippi

15. U. S. Post Office
Natchez, Mississippi

of action and has no standing to sue because the Order is not derived from statutory law, and the government has no unilateral right in MP & L's agreements for electrical service, to impose by mere reference thereto the pertinent sections of the Executive Order and regulations to which MP & L has not agreed. MP & L also says its agreements to furnish electrical service are not such contracts contemplated by the Order which may be rejected by contractors unwilling to agree to the impositions of the Executive Order inasmuch as MP & L, under its state franchise is compelled to furnish electricity to the government upon the government's request. In this connection the Court has concerned itself with regulation 60-1.4 (a) which provides for the inclusion of the equal opportunity clause in government contracts, defined in 60-1.3 (m) to include modifications, and 60-1.4 (e) providing that, by operation of the order, the equal opportunity clause shall be considered to be a part of every contract, interpreted by the government here to include contracts executed prior to the effective date of the Executive Order by virtue of rate increases made after said effective date, the rate increases being claimed by the government to be modifications, when the Executive Order clearly states in Section 202 that contracts *hereafter* entered into shall contain the equal opportunity clause. From the copies of the contracts before the Court for electrical service to GSA in the post office buildings in Jackson (1950) and Vicksburg (1950) and the Peoples-Newman Building in Vicksburg (1959), it is clear that the original contracts were executed prior to the effective date of Executive Order 11246 in October 24, 1965, if not its predecessors,[3] and, of course, were absent the equal opportunity clause.

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3. Executive Order 8802, 32 F.R. 1938-43, signed by President Roosevelt on June 25, 1941, was the first executive order to contain a non-discrimination clause.

[NOPSI CASE]

However, this concern of the Court and all other defenses claimed by defendant, with the exception of the 4th Amendment claim against unreasonable search and seizure, have been met and disposed of in U.S.A. v. New Orleans Public Service, Inc., 8 FEP Cases 1089, Civil Action No. 73-1297, on the docket of the U.S. District Court, Eastern District of Louisiana, Opinion rendered on November 13, 1974, by Judge Fred J. Cassibry. In that case, the United States filed suit against New Orleans Public Service, Inc. (NOPSI) to enforce the contractual obligations of Executive Order 11246 and its rules and regulations. NOPSI franchised by the City Council of New Orleans to furnish utilities to all customers who request same, has numerous agreements and contracts, written and oral, to serve various federal agencies. Many of these contracts antedate Executive Order 11246, with rate changes after its effective date. NOPSI, as MP & L here, had refused to incorporate the equal opportunity clause in its contracts, and refused to consider itself bound by the Executive Order and implementing rules.

Judge Cassibry's step by step findings of fact and conclusions of law need not be enumerated here. Suffice it to say he held that Executive Order 11246 has the force and effect of law, and, by its terms, the United States Department of Justice is authorized to enforce its terms; that the rules and regulations formulated by the Secretary, including each one under attack here, were issued pursuant to the authority granted by the Executive Order, and they, too, have the force and effect of law; that the equal opportunity clause is required to be in all nonexempt government contracts and modifications, whether agreed to by the parties or not, and its absence therefrom does not exclude such contracts from the provisions's coverage Judge Cas-

sibry's findings and conclusions were amply supported by cited law and are adopted by this Court in so far as they pertain to MP & L. Accordingly, the Court finds that MP & L is a government contractor subject to the terms of Executive Order 11246 and the implementing regulations.

The validity of Executive Order 11246 has been upheld in other cases. See U.S. v. Local 189, United Papermakers and Paperworkers, 282 F.Supp. 39, aff'd 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070, cert. denied, 397 U.S. 919, 2 FEP Cases 426. Also see Farkas v. Texas Instrument, Inc., 375 F.2d 629, 1 FEP Cases 890, 71 LRRM 3154, and Farmer v. Philadelphia Electric Company, 329 F.2d 3, 1 FEP Cases 36, 55 LRRM 2685 upholding the validity of Executive Orders precedent in time to Executive Order 11246. In Local 189, supra, the court held as a matter of law that it had jurisdiction of an action under #209 of Executive Order 11246, saying: "That order like the order in Farkas v. Texas Instrument, Inc. (citation omitted) is to be accorded the force and effect of statutory law."

[CONTRACTORS ASSN. CASE]

In Contractors Association of Eastern Pa. v. Secretary of Labor, 442 F.2d, 159, 3 FEP Cases 395, cert. denied, 404 U.S. 854, 3 FEP Cases 1030, the Third Circuit Court of Appeals had before it the validity of a labor force plan promulgated by the Secretary of labor in the Philadelphia, Pennsylvania, construction area growing out of Part III of Executive Order 11246, entitled "Nondiscrimination Provisions in Federally Assisted Construction Contracts", which section, like Part II, requires an affirmative action plan by the contractor. That court, in recognizing that the Executive branch of the government, through our system of checks and balances, is to enforce laws, not create them, considered in detail the origin of Executive Order 11246 and its predecessors. In commenting on Farmer and Farkas, the court noted that both assumed the validity of the Executive Order then applicable, referring to 40 U.S.C. #486(a) as the source of the Executive power to issue the order. The Court initially thought these assumptions dicta. However, after applying the guidance of Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, on limitations of Executive power, the Third Circuit came to its own conclusion thusly: "While the orders do not contain any specific statutory reference other than the appropriations statute, 31 U.S.C. #690, they would seem to be authorized by the broad grant of procurement authority with respect to Title 40 and 41." (40 U.S.C. #486 (a)). The Court went on to say: "No less than in the case of defense procurement, it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson's first category: action pursuant to the express or implied authorization of Congress." In this respect the government is not relegated to the role of a private citizen bound by the common law of contracts, i.e., negotiation and agreement on terms, but may claim its supremacy.

In another area of its defenses, MP&L concedes it is subject to the equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. #2000e, et seq. and contends that the government should be restricted to relief under that Act without seeking enforcement of an Executive Order which mandates the hiring of a specified number of minority group members under an affirmative action plan when such preferential treatment is specifically prohibited by Section 703j

of the Act, 42 U.S.C. #2000e(j). However as defendant concedes, the court in Contractors Association of Eastern Pa. v. Secretary of Labor, supra, held: "Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal."

[CONSTITUTIONALITY]

Not covered by any of the above cited cases, is defendant's strong contention that Section 202(5) of the Executive Order 11246 and implementing regulation 42 C.F.R. 60-1.43, which permit access to defendant's books, records and accounts and access to defendant's premises, are unconstitutional as an invasion of defendant's rights to be secure from unreasonable searches and seizures. Defendant equates the investigative function performed by a subpoena to the power claimed under the Executive Order, saying the result is the same: a search subject to the constraints of the Fourth Amendment, citing See v. Seattle, 387 U.S. 541. In See, the Supreme Court recognized that: "Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws; thus, entry may permit inspection of the structure in which a business is housed, as in this case, or inspection of business products, or a perusal of financial books and records. This Court has not had occasion to consider the Fourth Amendment's relation to this broad range of investigation. However, we have dealt with the Fourth Amendment issues raised by another common investigative technique, the administrative subpoena of corporate books and records. We find strong support in these subpoena cases for our conclusion that warrants are a necessary and tolerable limitation on the right to enter upon and inspect commercial premises."

This Court reluctantly finds See and other authorities cited by MP & L inapplicable. Those cases were not dealing in the atmosphere of contractual provisions providing for access to records and premises. Having found that MP & L is a government contractor subject to Executive Order 11246, the Court finds that the access to records and premises provisions of the Order, as implemented by the Secretary's rules and regulations, are warranted as necessary techniques to guarantee compliance with the Order, and further finds that MP & L, in denying such access, has violated Executive Order 11246, as amended, by refusing to comply with the Order and the rules and regulations issued pursuant thereto. See U.S. v. Biswell, 406 U.S. 311.

Accordingly, the Court denies defendant's motion for a judgment on the pleadings, and sustains the government's motion for a partial summary judgment. The Court will grant an injunction permanently enjoining MP & L from refusing to comply with all applicable provisions of Executive Order 11246 as implemented by the Secretary's rules and regulations. The Court will retain jurisdiction pending a final determination of all other issues raised by the pleadings. The Court sets aside its former Order of September 23, 1974, suspending discovery, and directs that discovery proceed.

An appropriate order or orders, including a form of injunction may be submitted within the time allowed by the rules of this Court.

General Injunctive Order

On April 21, 1975, this Court entered an Opinion in this action which granted the plaintiff United States of America's Motion for Partial Summary Judgment and

which denied the defendant Mississippi Power and Light Company's Motion for Judgment on the Pleadings or Dismissal. Pursuant to that Opinion, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

A. The defendant Mississippi Power and Light Company (hereinafter MP & L), its officers, agents, employees, successors, and all persons in active concert or participation with it, are permanently enjoined and restrained from:

1. Failing or refusing to comply with Executive Order 11246, as amended, and its successors (hereinafter Executive Order 11246) and the implementing rules and regulations issued pursuant thereto so long as MP & L has not received an exemption from coverage by Executive Order 11246 from the United States Secretary of Labor or his representative or successor, and so long as MP & L continues to supply any federal agency in the State of Mississippi with electrical utility services valued in excess of $10,000 per year.

2. Refusing to allow the General Services Administration or its successor compliance review agencies access, upon reasonable notice, to conduct compliance reviews which may include: (a) entry upon MP & L property for the examination of MP & L's facilities; and (b) examination and copying of MP & L's books, records, accounts, and other relevant material for the purpose of ascertaining MP & L's compliance with Executive order 11246 from October 24, 1965, the effective date of Executive Order 11246.

B. The United States shall recover from defendant MP & L its taxable costs in this matter (i.e. motion for partial summary judgment). However, determination of the amount of such costs shall be held in abeyance until

after the Court rules regarding MP & L's substantive compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto.

C. The parties are directed to proceed with discovery regarding MP & L's substantive compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto. Until this Court rules regarding MP & L's substantive compliance with Executive Order 11246 and the rules and regulations issued pursuant thereto, discovery by the parties in this case shall take precedence over the compliance reviews referred to in Paragraph A, 2, above.

D. The Court hereby retains jurisdiction of this action pending final determination of the remaining issues raised by the pleadings in this case.

APPENDIX D

E.O. 11246 ON NONDISCRIMINATION UNDER FEDERAL CONTRACTS

Text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967. Amended Part I, effective November 12, 1967, was superseded by Executive Order 11478 (See 401:1101), amended to add sex as prohibited basis of discrimination, effective October 13, 1968.

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

Ed. Note: Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC. (401:1101.)

PART II—NONDISCRIMINATION IN EMPLOYMENT BY GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

Subpart A—Duties of the Secretary of Labor

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order

and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B—Contractors' Agreements

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collec-

tive bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contacting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or

understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual

material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C—Powers and Duties of the Secretary of Labor and the Contracting Agencies

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary respon-

sibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other

interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D—Sanctions and Penalties

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other

modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

Subpart E—Certificates of Merit

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency

pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or

in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

APPENDIX E

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
DEPARTMENT OF LABOR

RULES AND REGULATIONS

Editor's Note: In Executive Order 11246, the President abolished the President's Committee on Equal Employment Opportunity and delegated the functions of that Committee to the Secretary of Labor. By Order of the Secretary of Labor, Oct. 22, 1965, all rules, regulations, orders, instructions, and other directives, issued by the abolished Committee not inconsistent with E.O. 11246 remain in effect for the present as those of the Secretary of Labor.

Following is the text of OFCCP Rules and Regulations, effective October 24, 1965, as last amended, effective February 17, 1977.

Chapter 60—Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor

NOTE.—The President, by Executive Order 11246 (80 FR 12319), abolished the President's Committee on Equal Employment Opportunity and delegated the functions of the abolished Committee to the Secretary of Labor. By order of the Secretary of Labor, 30 FR 13441, Oct. 22, 1965, all rules, regulations, orders, instructions, and other directives, issued by the abolished Committee, not inconsistent with E.O. 11246 remain in effect for the present as those of the Secretary of Labor. All references in this chapter to "Committee", "Chairman", "Vice-Chairman",

and "Executive Vice-Chairman" shall mean the Director of the Office of Federal Contract Compliance Programs of the United States Department of Labor, and all references to "a panel of the Committee" shall mean an appropriate panel of three appointed by the Director.

Part

Part 60-1—Obligations of Contractors and Subcontractors

Subject A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

Sec.

Subpart B—General Enforcement Compliance Review and Complaint Procedure

Subpart C—Ancillary Matters

SUBPART A—PRELIMINARY MATTERS; EQUAL OPPORTUNITY CLAUSE; COMPLIANCE REPORTS

§ 60-1.1. Purpose and application.

The purpose of the regulations in this part is to achieve the aims of Parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, or national origin, employed or seeking employment with Government contractors or with contractors performing

under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to Title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

§ 60-1.2 Administrative responsibility.

Under the general direction of the Secretary, the Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the order, except the power to issue rules and regulations of a general nature. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance, U.S. Department

of Labor, 14th and Constitution Avenue NW., Washington, D.C. 20210.

§ 60-1.3 Definitions.

"Administering agency" means any department, agency and establishment in the Executive Branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

"Administrative Law Judge" means an Administrative Law Judge appointed as provided in 5 U.S.C. 3105 and Subpart B of Part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

"Agency" means any contracting or any administering agency of the Government.

"Applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

"Compliance Agency" means the agency designated by the Director on a geographical, industry or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of the Order as the Director may determine to be appropriate.

"Construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing

utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

"Contract" means any Government contract or any federally assisted construction contract.

"Contracting agency" means any department agency, establishment, or instrumentality in the Executive Branch of the Government, including any wholly owned Government corporation, which enters into contracts.

"Contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

"Director" means the Director, Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor or any person to whom he delegates authority under the regulations in this part.

"Equal opportunity clause" means the contract provisions set forth in § 60-1.4(a) or (b), as appropriate.

"Federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participated in the construction work.

"Government" means the Government of the United States of America.

"Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term "services", as used in this section includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depository. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

"Minority group" as used herein shall include, where appropriate, female employees and perspective female employees.

"Modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

"Order", "Executive Order", or "Executive Order 11246" means Parts II, III, and IV of Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such Order, and any other Executive order superseding such order.

"Person" means any natural person, corporation, partnership unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

"Prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the Order.

"Recruiting and training agency" means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor

"Rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the Order.

"Secretary" means the Secretary of Labor, U.S. Department of Labor.

"Site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

"Subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

"Subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the Order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

"United States" as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States. (As last amended, effective February 17, 1977)

§ 60-1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of

such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses

to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(Subsection 60-1.4(b)(2) on federally assisted construction contracts was rescinded by publication in the Federal Register, effective March 28, 1975.)

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.*—The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate.

(e) *Incorporation by operation of the Order.*—By operation of the Order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written. (Subsections (d) and (e), as revised, effective February 17, 1977)

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings. (As last amended March 28, 1975)

§ 60-1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* —Contracts and subcontracts not exceeding $10,000, other than Government bills of lading and other than contracts and subcontracts with depositories of Federal funds in any amount and with financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause: *Provided,* That where a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000, the $10,000 or under exemption does not apply, and the contracts are subject to the Order and the regulations issued pursuant thereto regardless of whether any single contract exceeds $10,000. (Subsection (a) (1), as revised, effective February 17, 1977)

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase

notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except for educational institutions and medical facilities are [is] exempt from the requirements of filing the annual compliance report provided for by § 60-1.7(a) (1) and maintaining a written affirmative action compliance program prescribed by § 60-1.40 and Part 60-2 of this chapter.

(5) *Contracts with certain educational institutions.* It shall not be a violation of the equal opportunity clause

for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted. (Subsection 5, effective April 24, 1975)

(6) *Work on or near Indian reservations.*—It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word "near" would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter. (Subsection 6, as added, effective February 17, 1977)

(b) *Specific contracts and facilities*—(1) *Specifc contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the

national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal opportunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.* Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than

10 calendar days before the date set for the opening of the bids. (As last amended, March 25, 1975)

§ 60-1.6 Duties of agencies.

(a) *General responsibility.* Each agency shall be primarily responsible for obtaining compliance with the equal opportunity clause, the order, the regulations in this part, and orders issued pursuant thereto. Each agency shall cooperate with the Director and shall furnish him such information and assistance as he may require in the performance of his functions under the order. Such information shall include compliance review reports, schedules of compliance reviews and any other information relevant to the administration of the order.

(b) *Agency program.* The head of each agency shall, subject to the prior approval of the Director, establish a program and promulgate procedures to carry out the agency's responsibilities for obtaining compliance with the order and regulations and orders issued pursuant thereto. Each agency head shall also designate a Contract Compliance Officer, who (unless otherwise approved by the Director) shall be appointed by the head of the agency from among the agency's executive personnel to whom the Executive Schedule applies, and such officer shall be subject to the immediate supervision of the head of the agency. All compliance reviews required pursuant to the regulations in this part and such other compliance reviews as the Contract Compliance Officer determines to be appropriate shall be conducted by him or his designee. The head of the agency or the Contract Compliance Officer may also designate a Deputy Contract Compliance Officer to assist the Contract Compliance Officer in the performance of his duties. The names of the Contract Compliance Officers and the Deputy Contract Compliance Officers, their addresses and telephone numbers, and any changes made in their designation shall be furnished to the Director.

(c) *Agency regulations.* The head of each agency shall prescribe regulations for the administration of the order and the regulations, in this part. Agency regulations, directives and orders for such purpose must be submitted to the Director prior to issuance and may be enforced upon approval of the Director or 60 days after submission if not disapproved by the Director.

(d) (Reserved)

(e) *Evaluations.* The Director may from time to time evaluate the programs, procedures, and policies of agencies in order to assure their compliance with the order and the regulations in this part and the compliance of prime contractors and subcontractors with the equal opportunity clause.

§ 60-1.7 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.* (1) Each agency shall require each prime contractor and each prime contractor and subcontractor shall cause its subcontractors to file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any

amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided,* That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of subdivisions (i), (ii), and (iv) of this subparagraph.

(2) Each person required by § 60-1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60-1.7(a)(1), or at such other intervals as the agency or the Director may require. The agency with the approval of the Director may extend the time for filing any report.

(3) The Director, the agency or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director, agency or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the agency, the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part. Any such failure shall be reported in writing to the Director by the agency as soon as practicable after it occurs.

(b) *Requirements for bidders or prospective contractors*—(1) *Certification of compliance with Part 60-2: Affirmative Action Programs.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director, an agency, or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements. (As amended, July 1, 1970.)

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the agency or the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the agency, the applicant, or the Director requests.

(c) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

§ 60-1.8 Segregated facilities.

(a) *General.* In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, or national origin cannot result. He may neither require such segre-

gated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to ensuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) *Certification by prime contractors and subcontractors.* Prior to the award of any nonexempt Government contract or subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

§ 60-1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement, the labor union or unions which are

parties to such an agreement shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

§ 60-1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the

United States for work to be performed outside the United States (see 41 CFR 60-1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Director of such refusal. (As added, effective February 17, 1977)

SUBPART B—GENERAL ENFORCEMENT; COMPLIANCE REVIEW AND COMPLAINT PROCEDURE

§ 60-1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the Contract Compliance Officer, appropriate Deputy or the agency head of such commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) The Compliance Agency shall have the primary responsibility for the conduct of compliance reviews. Agencies shall institute programs for the regular conduct of compliance reviews in accordance with the Director's guidelines, and shall also conduct compliance reviews in accordance with any special requests or instructions of the Director. Compliance reviews may also be conducted by the Director. Compliance reviews should be conducted by qualified specialists regularly involved in equal opportunity programs.

(d) Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and his known first-tier subcontractors with subcontracts of $1 million or more will be subject to a compli-

ance review before the award of the contract. No such contract shall be awarded unless a preaward compliance review of the prospective contractor and his known first-tier $1 million subcontractors has been conducted by the compliance agency within 12 months prior to the award. If an agency other than the awarding agency is the compliance agency, the awarding agency will notify the compliance agency and request appropriate action and findings in accordance with this subsection. Compliance agencies will provide awarding agencies with written reports of compliance within 30 days following the request. In order to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found to be in compliance pursuant to paragraph (b) of this section, and with Part 60-2 of these regulations. (As amended July 1, 1970.)

§ 60-1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the compliance agency or the Director for good cause shown. (As revised, effective February 17, 1977)

§ 60-1.22 Where to file.

Complaints may be filed with the compliance agency or the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Those filed with the Director may be referred to the compliance agency for processing, or they may be processed by the Director in accordance with § 60-1.24 (As revised, effective February 17, 1977)

§ 60-1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor or subcontractor committing the

alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met.

(b) If a complaint contains incomplete information, the compliance agency or OFCCP shall seek the needed information from the complainant. In the event such information is not furnished to the compliance agency or the Director within 60 days of the date of such request, the case may be closed. (As revised, effective February 17, 1977)

§ 60-1.24 Processing of matters by agencies and the Director.

(a) *Complaints.*—A copy of each complaint filed with the compliance agency shall be transmitted to the Director within 10 days after the receipt thereof, OFCCP and the compliance agencies may refer appropriate complaints to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII of the Civil Rights Act of 1964, as amended, rather than processing under E.O. 11246 and the regulations in this chapter. Upon referring complaints to the EEOC, compliance agencies or the OFCCP, as appropriate, shall promptly notify complainant(s) and the contractor of such referral.

(b) *Complaint investigations.*—In conducting complaint investigations, OFCCP or the compliance agency shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record. The compliance

agency shall follow such other guidance in investigating the complaints as the Director provides. The case record should contain the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, a reference to at least one covered contract, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations. When a complaint is filed against a prime contractor or subcontractor who has contracts involving more than one agency, unless otherwise provided, the compliance agency shall conduct the investigation and make such findings and determinations as shall be appropriate for the administration of the Order.

(c) *Resolution of matters.*—(1) If the complaint investigation by the compliance agency pursuant to paragraph (b) of this section shows no violation of the equal opportunity clause, the agency shall so inform the Director. The Director may review the findings of the agency, and he/she may request further investigation by the agency or may undertake such investigation as he/she may deem appropriate.

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference by the compliance agency. Each prime contractor and subcontractor shall be advised that the resolution is subject to review by the Director and may be disapproved if he/she determines that such resolution is not sufficient to achieve compliance.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause

and the matter has not been resolved by informal means, the Director or the compliance agency, with the approval of the Director, shall proceed in accordance with § 60-1.26.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of a compliance agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

(5) For reasonable cause shown, the Director or a compliance agency may reconsider or cause to be reconsidered any matter on his/her own motion or pursuant to a request.

(d) *Reports to the Director.*—(1) With the exception of complaints which have been referred to EEOC, within 60 days from receipt of a complaint by the compliance agency, or within such additional time as may be allowed by the Director for good cause shown, the compliance agency shall process the complaint and submit to the Director the case record and a summary report containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement as to the agency's conclusions regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, including findings, will be forwarded to the Director within 10 days after the award for a post-award review.

(3) A written report of every other compliance review or any other matter processed by the agency involving an apparent violation of the equal opportunity clause shall be submitted to the Director. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the Order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended. (As revised, effective February 17, 1977)

§ 60-1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency or a Compliance Agency, including complaints and matters arising out of reports, reviews, and other investigations. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter, he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanction to be imposed

by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

§ 60-1.26 Enforcement proceedings.

(a) *General.*—(1) Violations of the Order, equal opportunity clause, the regulations in this chapter, or of applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings to enforce the Order and to seek appropriate relief. Violations may be found based upon, inter alia, any of the following: (i) The results of a complaint investigation; (ii) analysis of an affirmative action program; (iii) the results of an on-site review of the contractor's compliance with the Order and its implementing regulations; (iv) a contractor's refusal to submit an affirmative action program; (v) a contractor's refusal to allow an on-site compliance review to be conducted; (vi) a contractor's refusal to supply records or other information as required by these regulations or applicable construction industry requirements; or (vii) any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations issued pursuant thereto.

(2) If the investigation of a complaint, or a compliance review, results in a determination that the Order, equal opportunity clause or regulations issued pursuant thereto, have been violated, and the violations have not been corrected in accordance with the conciliation procedures in this chapter, the compliance agency (with the prior approval of the Director), or OFCCP may institute an administrative enforcement proceeding to enjoin the violations, to seek appropriate relief (which may include

affected class and back pay relief), and to impose appropriate sanctions, or any of the above. However, if the contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow the compliance agency access to its premises for an on-site review; and if conciliation efforts under this chapter are unsuccessful, the compliance agency (with the prior approval of the Director) or OFCCP, notwithstanding the requirements of this chapter, may go directly to administrative enforcement proceedings to enjoin the violations to seek appropriate relief, and to impose appropriate sanctions, or any of the above. Whenever the Director has reason to believe that there is substantial or material violation or the threat of substantial or material violation of the contractual provisions of the Order or of the rules, regulations or orders issued pursuant thereto, he/she may refer the matter to the Solicitor of Labor to institute administrative enforcement proceedings as set forth in this section or refer the matter to the Department of Justice to enforce the contractual provisions of the Order, to seek injunctive relief (including relief against noncontractors, including labor unions, who seek to thwart implementation of the Order and regulations) and to seek such additional relief, including back pay, as may be appropriate. There are no procedural prerequisites to a referral to the Department of Justice by the Director, and such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter: *Provided,* That no order for debarment from further contracts or subcontracts pursuant to section 209(a)(6) of the Order shall be made without affording the contractor an opportunity for a hearing, either administrative or judicial.

(b) *Request to institute enforcement proceedings.*— (1) If a compliance agency determines that a contractor or any other person, organization or group is in violation or threatens violation of the Order or the regulations issued pursuant thereto (through, e.g., any of the seven examples listed in § 60-1.26(a)), the compliance agency shall attempt to resolve the matter, where appropriate, through the conciliation procedure set out in this chapter. If the compliance agency is unable to resolve the matter, it shall send to the Director a written request for the institution of either administrative or judicial enforcement proceedings. The request shall describe at least one contract which covers the contractor under the Order (or if the proposed defendant is not a contractor, the basis for finding coverage under the Order) and under § 60-1.40, if appropriate. The request shall specify sections of the Order or regulations allegedly violated and briefly describe the facts which give rise to the violations. Appropriate documentation and statistical analysis also shall be attached.

(2) If the compliance agency requests that administrative enforcement proceedings be instituted, a proposed administrative complaint which conforms to the regulations in § 60-30.5 of this chapter shall be attached to the request to institute enforcement proceedings.

(3) The Director is not bound by a request for enforcement from a compliance agency, and he/she may take such action as he/she deems appropriate: *Provided,* That where analysis of a request for enforcement proceedings (including additional investigation, if necessary) indicates a violation of the Order or its implementing regulations, and the Director is unable to resolve the matter through informal methods, he/she shall refer the matter to the Solicitor of Labor to institute enforcement proceedings under § 60-1.26.

(c) *Administrative enforcement proceedings.*—Administrative enforcement proceedings initiated by a compliance agency or the OFCCP shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in Part 60-30 of this chapter.

(d) *Decision following administrative proceeding*—If it is determined after a hearing (or after the contractor waives a hearing) that the contractor is violating the Order or the regulations issued thereunder, the compliance agency (in accordance with 41 CFR 60-30.30(b)) or the Secretary (in accordance with 41 CFR 60-30.30(a)) shall issue an Administrative Order enjoining the violations and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the imposition of the sanctions contained in section 209(a)(5) or (a)(6) of the Executive Order.

(e) *Referrals to the Department of Justice*—(e) Whenever a matter has been referred to the Department of Justice for consideration of judicial proceedings pursuant to § 60-1.26(a)(2) of these regulations, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

(2) The Attorney General is authorized to conduct such investigation of the facts as he may deem necessary

or appropriate to carry out his responsibilities under these regulations.

(3) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Director, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of his findings, his intent to file suit, and the actions he believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation.

(4) As defined in these regulations, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(5) The Director or his/her designee, representatives of the compliance agencies and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(f) *Initiation of lawsuits by the Attorney General without referral from the Director.*—In addition to ini-

tiating lawsuits upon referral under 41 CFR 60-1.26, the Attorney General may, subject to approval by the Director, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he shall make reasonable efforts to secure compliance with the contract provisions of the Order. He may do so by providing the contractor and any other respondent with reasonable notice of the Department's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Director, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above.

(g) To the extent applicable, this section and part 60-30 of this chapter shall govern proceedings resulting from the Director's determination under § 60-2.2(b) and there are substantial issues of law or fact as to the contractor/bidder's responsibility. (As revised, effective February 17, 1977)

§ 60-1.27 Sanctions and penalties.

The sanctions described in subsections (1), (5), and (6) of section 209 (a) of the order may be exercised only by or with the approval of the Director. Referral of any matter arising under the order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

§ 60-1.28 Show cause notices.

When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

§ 60-1.29 Preaward notices.

(a) *Preaward compliance reviews.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts with any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or designated agency head or his designee has approved a determination that the bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder, prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

§ 60-1.30 Contract ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the order.

§ 60-1.31 Reinstatement of ineligible prime contractors and subcontractors.

Any prime contractor or subcontractor declared ineligible for further contracts or subcontracts under the order may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the equal opportunity clause.

§ 60-1.32 Intimidation and Interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the agency or the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

SUBPART C—ANCILLARY MATTERS

§ 60-1.40 Affirmative action compliance programs.

(a) *Requirements of programs.*—Each agency or applicant shall require each prime contractor who has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and (1) has a subcontract of $50,000 or more; or (2) has Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of the specific goals and timetables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in its affirmative action compliance program a table of job classifications. This table should include but need not be limited to job

titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applies (because of length of time in the job or other factors), the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor. (As revised, effective February 17, 1977)

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action

program and the result it produces shall be evaluated as part of compliance review activities.

§ 60-1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

§ 60-1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director or by the agency with the approval of the Director, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of

the equal opportunity clause will contain the following language and will be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS OF 1964 AND BY EXECUTIVE ORDER No. 11246

Title VII of the Civil Rights Act of 1964—*Administered by*:

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 75 or more employees, by Labor Organizations with a hiring hall of 75 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training. After July 1, 1967, employers and labor organizations with 50 or more employees or members will be covered; after July 1, 1968, those with 25 or more will be covered.

Any Person
Who believes he or she has been discriminated against
Should Contact

The Equal Employment Opportunity Commission
1800 G Street N.W.
Washington, D.C. 20506

Executive Order No. 11246—*Administered by*:
The Office of Federal Contract Compliance

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative

action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

Any Person
Who believes he or she has been discriminated against
Should Contact

The Office of Federal Contract Compliance
U.S. Department of Labor
Washington, D.C. 20210

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the prime contractor or subcontractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment and representatives of each labor union or other organization representing his employees with which he has a collective bargaining agreement or other contract or understanding.

§ 60-1.43 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts, and other material as may be relevant to the matter under investigation and pertinent to compliance with the order and the rules and regulations pursuant thereto by the

agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the administration of the Civil Rights Act of 1964 (as amended) and in furtherance of the purposes of the Order and that Act. (See 41 CFR Part 60-60, Contractor Evaluation Procedures For Non-construction Contractors; 41 CFR Part 60-40. Examination and Copying of OFCCP Documents.)

§ 60.144 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60.145 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60-1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

§ 60-1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any shall be governed by the regulations agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 F.R. 9812, September 2, 1963, and at 28 F.R. 11305, October 23, 1963, the temporary regulations which appear at 30 F.R. 13441, October 22, 1965, and the orders at 31 F.R. 6881, May 10, 1966, and 32 F.R. 7439, May 19, 1967.

APPENDIX F

[CHAPTER 288]

AN ACT

To simplify the procurement, utilization, and disposal of Government property, to reorganize certain agencies of the Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "Federal Property and Administrative Services Act of 1949".

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DECLARATIONS OF POLICY

SEC. 2. It is the intent of the Congress in enacting this legislation to provide for the Government an economical and efficient system for (a) the procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, specifications, property identification and classification, transportation and traffic management, management of public utility services, repairing and converting establishment of inventory levels, establishment of forms and procedures, and representation before Federal and State regulatory bodies; (b) the utilization of available property; (c) the disposal of surplus property; and (d) records management.

DEFINITIONS

SEC. 3. As used in this Act—

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate and the House of Representatives).

(c) The term "Administrator" means the Administrator of General Services provided for in title I hereof.

(d) The term "property" means any interest in property of any kind except (1) the public domain and lands reserved or dedicated for national forest or national park purposes; and (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines.

(e) The term "excess property" means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof.

(f) The term "foreign excess property" means any excess property located outside the continental United States, Hawaii, Alaska, Puerto Rico, and the Virgin Islands.

(g) The term "surplus property" means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator.

(h) The term "care and handling" includes completing, repairing, converting, rehabilitating, operating, pre-

serving, protecting, insuring, packing, storing, handling, conserving, and transporting excess and surplus property, and, in the case of property which is dangerous to public health or safety, destroying or rendering innocuous such property.

(i) The term "person" includes any corporation, partnership, firm, association, trust, estate, or other entity.

(j) The term "nonpersonal services" means such contractual services, other than personal and professional services, as the Administrator shall designate.

(k) The term "contractor inventory" means (1) any property acquired by and in the possession of a contractor or subcontractor under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (2) any property which the Government is obligated to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

TITLE I—ORGANIZATION

GENERAL SERVICES ADMINISTRATION

SEC. 101. (a) There is hereby established an agency in the executive branch of the Government which shall be known as the General Services Administration.

(b) There shall be at the head of the General Services Administration an Administrator of General Services who shall be appointed by the President by and with the advice and consent of the Senate, and perform his functions subject to the direction and control of the President.

(c) There shall be in the General Services Administration a Deputy Administrator of General Services who shall be appointed by the Administrator of General Services. The Deputy Administrator shall perform such functions as the Administrator shall designate and shall be Acting Administrator of General Services during the absence or disability of the Administrator and, unless the President shall designate another officer of the Government, in the event of a vacancy in the office of Administrator.

(d) Pending the first appointment of the Administrator under the provisions of this section, his functions shall be performed temporarily by such officer of the Government in office upon or immediately prior to the taking of effect of the provisions of this Act as the President shall designate, and such officer while so serving shall receive the salary fixed for the Administrator.

(e) Pending the effective date of other provisions of law fixing the rates of compensation of the Administrator, the Deputy Administrator and of the heads and assistant heads of the principal organizational units of the General Services Administration, and taking into consideration provisions of law governing the compensation of officers having comparable responsibilities and duties, the President shall fix for each of them a rate of compensation which he shall deem to be commensurate with the responsibilities and duties of the respective offices involved.

TRANSFER OF AFFAIRS OF BUREAU OF FEDERAL SUPPLY

SEC. 102. (a) The functions of (1) the Bureau of Federal Supply in the Department of the Treasury, (2) the Director of the Bureau of Federal Supply, (3) the personnel of such Bureau, and (4) the Secretary of the Treasury,

relating to the Bureau of Federal Supply, are hereby transferred to the Administrator. The records, property, personnel, obligations, and commitments of the Bureau of Federal Supply, together with such additional records, property, and personnel of the Department of the Treasury as the Director of the Bureau of the Budget shall determine to relate primarily to functions transferred by this section or vested in the Administrator by titles II, III, and V, of this Act, are hereby transferred to the General Services Administration. The Bureau of Federal Supply and the office of Director of the Bureau of Federal Supply are hereby abolished.

(b) The functions of the Director of Contract Settlement and of the Office of Contract Settlement, transferred to the Secretary of the Treasury by Reorganization Plan Numbered 1 of 1947, are transferred to the Administrator and shall be performed by him or, subject to his direction and control, by such officers and agencies of the General Services Administration as he may designate. The Contract Settlement Act Advisory Board created by section 5 of the Contract Settlement Act of 1944 (58 Stat. 649) and the Appeal Board established under section 13 (d) of that Act are transferred from the Department of the Treasury to the General Services Administration, but the functions of these Boards shall be performed by them, respectively, under conditions and limitations prescribed by law. There shall also be transferred to the General Services Administration such records, property, personnel, obligations, commitments, and unexpended balances (available or to be made available) of appropriations, allocations, and other funds of the Treasury Department as the Director of the Bureau of the Budget shall determine to relate primarily to the functions transferred by the provisions of this subsection.

(c) Any other provision of this section notwithstanding, there may be retained in the Department of the Treasury any function referred to in subsection (a) of this section which the Director of the Bureau of the Budget shall, within ten days after the effective date of this Act, determine to be essential to the orderly administration of the affairs of the agencies of such Department, other than the Bureau of Federal Supply, together with such records, property, personnel, obligations, commitments, and unexpended balances of appropriations, allocations, and other funds, available or to be made available, of said Department, as said Director shall determine.

TRANSFER OF AFFAIRS OF THE FEDERAL WORKS AGENCY

SEC. 103. (a) All functions of the Federal Works Agency and of all agencies thereof, together with all functions of the Federal Works Administrator, of the Commissioner of Public Buildings, and of the Commissioner of Public Roads, are hereby transferred to the Administrator of General Services. There are hereby transferred to the General Services Administration the Public Roads Administration, which shall hereafter be known as the Bureau of Public Roads, and all records, property, personnel, obligations, and commitments of the Federal Works Agency, including those of all agencies of the Federal Works Agency.

(b) There are hereby abolished the Federal Works Agency, the Public Buildings Administration, the office of Federal Works Administrator, the office of Commissioner of Public Buildings, and the office of Assistant Federal Works Administrator.

RECORDS MANAGEMENT: TRANSFER OF THE NATIONAL ARCHIVES

SEC. 104. (a) The National Archives Establishment and its functions, records, property, personnel, obligations, and commitments are hereby transferred to the General Services Administration. There are transferred to the Administrator (1) the functions of the Archivist of the United States, except that the Archivist shall continue to be a member or chairman, as the case may be, of the bodies referred to in subsection (b) of this section, and (2) the functions of the Director of the Division of the Federal Register of the National Archives Establishment. The Archivist of the United States shall hereafter be appointed by the Administrator.

(b) There are also transferred to the General Services Administration the following bodies, together with their respective functions and such funds as are derived from Federal sources: (1) The National Archives Council and the National Historical Publications Commission, established by the Act of June 19, 1934 (48 Stat. 1122), (2) the National Archives Trust Fund Board, established by the Act of July 9, 1941 (55 Stat. 581), (3) the Board of Trustees of the Franklin D. Roosevelt Library, established by the Joint Resolution of July 18, 1939 (53 Stat. 1062), and (4) the Administrative Committee established by section 6 of the Act of July 26, 1935 (49 Stat. 501), which shall hereafter be known as the Administrative Committee of the Federal Register. The authority of the Administrator under section 106 hereof shall not extend to the bodies or functions affected by this subsection.

(c) The Administrator is authorized (1) to make surveys of Government records and records management and disposal practices and obtain reports thereon from Federal agencies; (2) to promote, in cooperation with the executive agencies, improved records management practices and controls in such agencies, including the central storage or disposition of records not needed by such agencies for their current use; and (3) to report to the Congress and the Director of the Bureau of the Budget from time to time the results of such activities.

TRANSFER FOR LIQUIDATION OF THE AFFAIRS OF THE WAR ASSETS ADMINISTRATION

SEC. 105. The functions, records, property, personnel, obligations, and commitments of the War Assets Administration are hereby transferred to the General Services Administration. The functions of the War Assets Administrator are hereby transferred to the Administrator of General Services. The War Assets Administration, the office of the War Assets Administrator, and the office of Associate War Assets Administrator are hereby abolished. Personnel now holding appointments granted under the second sentence of section 5 (b) of the Surplus Property Act of 1944, as amended, may be continued in such positions or may be appointed to similar positions for such time as the Administrator may determine.

REDISTRIBUTION OF FUNCTIONS

SEC. 106. The Administrator is hereby authorized, in his discretion, in order to provide for the effective accomplishment of the functions transferred to or vested in him by this Act, and from time to time, to regroup, transfer, and distribute any such functions within the General Services Administration. The Administrator is hereby authorized to transfer the funds necessary to accomplish said functions and report such transfers of funds to the Director of the Bureau of the Budget.

TRANSFER OF FUNDS

SEC. 107. (a) All unexpended balances of appropriations, allocations, or other funds available or to be made available, for the use of the Bureau of Federal Supply, the War Assets Administration, the Federal Works Agency, and the National Archives Establishment, and so much of the other unexpended balances of appropriations, allocations, or other funds of the Department of the Treasury, available or to be made available, as the Director of the Bureau of the Budget shall determine to relate primarily to functions transferred to or vested in the Administrator by the provisions of this Act, shall be transferred to the General Services Administration for use in connection with the functions to which such balances relate, respectively.

(b) When other functions are transferred to the General Services Administration from any Federal agency, under section 201 (a) (2) or (3), or otherwise under this Act, there shall be transferred such records, property, personnel, appropriations, allocations, and other funds of such agency to the General Services Administration as the Director of the Bureau of the Budget shall determine to relate primarily to the functions so transferred.

STATUS OF TRANSFERRED EMPLOYEES

SEC. 108. Subject to other provisions of this title relating to personnel, employees transferred by the provisions of this title shall be deemed to be employees of the General Services Administration and their reappointment shall not be required by reason of the enactment of this Act.

GENERAL SUPPLY FUND

SEC. 109. (a) There is hereby authorized to be set aside in the Treasury a special fund which shall be known

as the General Supply Fund. Such fund shall be composed of the assets of the general supply fund (including any surplus therein) created by section 3 of the Act of February 27, 1929 (45 Stat. 1342; 41 U. S. C. 7c), and transferred to the Administrator by section 102 of this Act, and such sums as may be appropriated thereto, and the fund shall assume all of the liabilities, obligations, and commitments of the general supply fund created by such Act of February 27, 1929. The capital of the General Supply Fund shall be in an amount not greater than $75,000,000. The General Supply Fund shall be available for use by or under the direction and control of the Administrator (1) for procuring personal property (including the purchase from or through the Public Printer of standard forms and blankbook work for field warehouse issue) and nonpersonal services for the use of Federal agencies in the proper discharge of their responsibilities, and (2) for paying all elements of cost of the procurement, handling, and distribution thereof, except that on and after July 1, 1950, those elements of cost which are determined by the Administrator with the approval of the Director of the Bureau of the Budget to be indirect or overhead costs shall not be paid from the fund.

(b) Payment by requisitioning agencies shall be at prices fixed by the Administrator. Until July 1, 1950, such prices shall be fixed in accordance with law and regulations applicable on the date of enactment of this Act to prices fixed by the Director of the Bureau of Federal Supply. On and after such date, such prices shall be fixed at levels so as to recover so far as practicable all costs except those which are determined by the Administrator with the approval of the Director of the Bureau of the Budget to be indirect or overhead costs. Requisitioning agencies shall pay by advance of funds in all cases where it is determined by the Administrator that there is insuffi-

cient capital otherwise available in the General Supply Fund. Advances of funds also may be made by agreement between the requisitioning agencies and the Administrator. Where an advance of funds is not made, requisitioning agencies shall promptly reimburse the General Services Administration on vouchers prepared by the requisitioning agency on the basis of itemized invoices submitted by the Administrator and receiving reports evidencing the delivery to the requisitioning agency of such supplies or services: *Provided,* That in any case where payment shall not have been made by the requisitioning agency within forty-five days after the date of billing by the Administrator, reimbursement may be obtained by the Administrator by the issuance of transfer and counterwarrants supported by itemized invoices.

(c) The General Supply Fund shall be credited with all reimbursements, advances of funds, and refunds or recoveries relating to supplies or services procured through the fund, including the net proceeds of disposal of surplus supplies procured through the fund and receipts from carriers and others for loss of, or damage to, supplies procured through the fund; and the same are hereby reappropriated for the purposes of the fund.

(d) A special deposit account may be established as a part of the General Supply Fund with the Treasurer of the United States for use by the chief disbursing officer or any regional disbursing officer, Department of the Treasury, which may be credited with (1) funds advanced from the General Supply Fund account on the books of the Division of Bookkeeping and Warrants and (2) other funds properly for credit to the General Supply Fund without being covered into the Treasury of the United States; and such special deposit account may be charged with payments properly chargeable to the General Supply Fund.

(e) The Comptroller General of the United States shall make an annual audit of the General Supply Fund as of June 30, and there shall be covered into the United States Treasury as miscellaneous receipts any surplus found therein, all assets, liabilities, and prior losses considered, above the amounts transferred or appropriated to establish and maintain said fund, and the Comptroller General shall report to the Congress annually the results of the audit, together with such recommendations as he may have regarding the status and operations of the fund.

(f) Subject to the requirements of subsections (a) to (e), inclusive, of this section, the General Supply Fund also may be used for the procurement of supplies and nonpersonal services authorized to be acquired by mixed-ownership Government corporations, or by the municipal government of the District of Columbia, or by a requisitioning non-Federal agency when the function of a Federal agency authorized to procure for it is transferred to the General Services Administration: *Provided,* That the prices charged by the Administrator in such cases shall be fixed at levels which he estimates will be sufficient to recover, in addition to the direct costs of the procurement, handling, and distribution of such supplies and services, the indirect and overhead costs that the Administrator determines are allocable thereto.

TITLE II—PROPERTY MANAGEMENT

PROCUREMENT, WAREHOUSING, AND RELATED ACTIVITIES

SEC. 201. (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and

(2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1): *Provided,* That contracts for public utility services may be made for periods not exceeding ten years; and

(4) with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;

Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the National Military Establishment from action taken or which may be taken by the Administrator under clauses (1), (2), (3), and (4) above whenever he determines such exemption to be in the best interests of national security.

(b) The Administrator shall as far as practicable provide any of the services specified in subsection (a) of this section to any other Federal agency, mixed ownership corporation (as defined in the Government Corporation Control Act), or the District of Columbia, or the Senate, or the House of Representatives, upon its request.

(c) In acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment for the property acquired: *Provided,* That any transaction carried out under the authority of this subsection shall be evidenced in writing.

PROPERTY UTILIZATION

SEC. 202. (a) In order to minimize expenditures for property, the Administrator shall prescribe policies and methods to promote the maximum utilization of excess property by executive agencies, and he shall provide for the transfer of excess property among Federal agencies.

(b) Each executive agency shall (1) maintain adequate inventory controls and accountability systems for the property under its control, (2) continuously survey property under its control to determine which is excess property, and promptly report such property to the Administrator, (3) perform the care and handling of such excess property, and (4) transfer or dispose of such property as promptly as possible in accordance with authority delegated and regulations prescribed by the Administrator.

(c) Each executive agency shall, as far as practicable, (1) make reassignments of property among activities within the agency when such property is determined to be no longer required for the purposes of the appropriation from

which it was purchased, (2) transfer excess property under its control to other Federal agencies, and (3) obtain excess property from other Federal agencies.

(d) Under existing provisions of law and procedures defined by the Secretary of Defense, and without regard to the requirements of this section except subsection (f), excess property of one of the departments of the National Military Establishment may be transferred to another department thereof.

(e) Transfers of excess property between Federal agencies (except transfers for redistribution to other Federal agencies or for disposal as surplus property) shall be at the fair value thereof, as determined by, or pursuant to regulations of, the Administrator, unless such transfer is otherwise authorized by any law approved subsequent to June 21, 1944, to be without reimbursement or transfer of funds.

(f) The Director of the Bureau of the Budget shall prescribe regulations providing for the reporting to said Director by executive agencies of such reassignments or transfers of property between activities financed by different appropriations as he shall deem appropriate, and the reassignments and transfers so reported shall be reported to the Congress in the annual budget or otherwise as said Director may determine.

(g) Whenever the Administrator determines that the temporary assignment or reassignment of any space in excess real property to any Federal agency for office, storage, or related facilities would be more advantageous than the permanent transfer of such property, he may make such assignment or reassignment for such period of time as he shall determine and obtain, in the absence of appropriation available to him therefor, appropriate reimbursement from

the using agency for the expense of maintaining such space.

(h) The Administrator may authorize the abandonment, destruction, or donation to public bodies of property which has no commercial value or of which the estimated cost of continued care and handling would exceed the estimated proceeds from its sale.

DISPOSAL OF SURPLUS PROPERTY

SEC. 203. (a) Except as otherwise provided in this section, the Administrator shall have supervision and direction over the disposition of surplus property. Such property shall be disposed of to such extent, at such time, in such areas, by such agencies, at such terms and conditions, and in such manner, as may be prescribed in or pursuant to this Act.

(b) The care and handling of surplus property, pending its disposition, and the disposal of surplus property, may be performed by the General Services Administration or, when so determined by the Administrator, by the executive agency in possession thereof or by any other executive agency consenting thereto.

(c) Any executive agency designated or authorized by the Administrator to dispose of surplus property may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the provisions of this title.

(d) A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency pur-

porting to transfer title or any other interest in surplus property under this title shall be conclusive evidence of compliance with the provisions of this title insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance.

(e) Unless the Administrator shall determine that disposal by advertising will in a given case better protect the public interest, surplus property disposals may be made without regard to any provision of existing law for advertising until 12 o'clock noon, eastern standard time, December 31, 1950.

(f) Subject to regulations of the Administrator, any executive agency may authorize any contractor with such agency or subcontractor thereunder to retain or dispose of any contractor inventory.

(g) The Administrator, in formulating policies with respect to the disposal of surplus agricultural commodities, surplus foods processed from agricultural commodities, and surplus cotton or woolen goods, shall consult with the Secretary of Agriculture. Such policies shall be so formulated as to prevent surplus agricultural commodities, or surplus food processed from agricultural commodities, from being dumped on the market in a disorderly manner and disrupting the market prices for agricultural commodities.

(h) Whenever the Secretary of Agriculture determines such action to be required to assist him in carrying out his responsibilities with respect to price support or stabilization, the Administrator shall transfer without charge to the Department of Agriculture any surplus agricultural commodities, foods, or cotton or woolen goods to be disposed of. Receipts resulting from disposal by the Department of Agriculture under this subsection shall be

deposited pursuant to any authority available to the Secretary of Agriculture, except that net proceeds of any sale of surplus property so transferred shall be credited pursuant to section 204 (b), when applicable. Surplus farm commodities so transferred shall not be sold, other than for export, in quantities in excess of, or at prices less than, those applicable with respect to sales of such commodities by the Commodity Credit Corporation.

(i) The United States Maritime Commission shall dispose of surplus vessels of one thousand five hundred gross tons or more which the Commission determines to be merchant vessels or capable of conversion to merchant use, and such vessels shall be disposed of only in accordance with the provisions of the Merchant Marine Act, 1936, as amended, and other laws authorizing the sale of such vessels.

(j) (1) Under such regulations as he may prescribe, the Administrator is authorized in his discretion to donate for educational purposes in the States, Territories, and possessions without cost (except for costs of care and handling) such equipment, materials, books, or other supplies under the control of any executive agency as shall have been determined to be surplus property and which shall have been determined under paragraph 2 or paragraph 3 of this subsection to be usable and necessary for educational purposes.

(2) Determination whether such surplus property (except surplus property donated in conformity with paragraph 3 of this subsection) is usable and necessary for educational purposes shall be made by the Federal Security Administrator, who shall allocate such property on the basis of needs and utilization for transfer by the Administrator of General Services to tax-supported school systems, schools, colleges, and universities, and to other

nonprofit schools, colleges, and universities which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code, or to State departments of education for distribution to such tax-supported and nonprofit school systems, schools, colleges, and universities; except that in any State where another agency is designated by State law for such purpose such transfer shall be made to said agency for such distribution within the State.

(3) In the case of surplus property under the control of the National Military Establishment, the Secretary of Defense shall determine whether such property is usable and necessary for educational activities that are of special interest to the armed services, such as maritime academies or military, naval, Air Force, or Coast Guard preparatory schools. If such Secretary shall determine that such property is usable and necessary for such purposes, he shall allocate it for transfer by the Administrator to such educational activities. If he shall determine that such property is not usable and necessary for such purposes, it may be disposed of in accordance with paragraph 2 of this subsection.

(k) (1) Under such regulations as he may prescribe, the Administrator is authorized, in his discretion, to assign to the Federal Security Administrator for disposal such surplus real property, including buildings, fixtures, and equipment situated thereon, as is recommended by the Federal Security Administrator as being needed for school, classroom, or other educational use, or for use in the protection of public health, including research.

(A) Subject to the disapproval of the Administrator within thirty days after notice to him by the Federal Security Administrator of a proposed transfer of property for school, classroom, or other educational

use, the Federal Security Administrator, through such officers or employees of the Federal Security Agency as he may designate, may sell or lease such real property, including buildings, fixtures, and equipment situated thereon, for educational purposes to the States and their political subdivisions and instrumentalities, and tax-supported educational institutions, and to other nonprofit educational institutions which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(B) Subject to the disapproval of the Administrator within thirty days after notice to him by the Federal Security Administrator of a proposed transfer of property for public-health use, the Federal Security Administrator, through such officers or employees of the Federal Security Agency as he may designate, may sell or lease such real property for public-health purposes, including research, to the States and their political subdivisions and instrumentalities, and to tax-supported medical institutions, and to hospitals or other similar institutions not operated for profit which have been held exempt from taxation under section 101 (6) of the Internal Revenue Code.

(C) In fixing the sale or lease value of property to be disposed of under subparagraph (A) and subparagraph (B) of this paragraph, the Federal Security Administrator shall take into consideration any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or institution.

(D) "States" as used in this subsection includes the District of Columbia and the Territories and possessions of the United States.

(2) Subject to the disapproval of the Administrator within thirty days after notice to him of any action to be taken under this subsection—

(A) The Federal Security Administrator, through such officers or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions, and instrumentalities thereof, and tax-supported and other nonprofit educational institutions for school, classroom, or other educational use;

(B) the Federal Security Administrator, through such officer or employees of the Federal Security Agency as he may designate, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions and instrumentalities thereof, tax-supported medical institutions, and to hospitals and other similar institutions not operated for profit, for use in the protection of public health (including research);

(C) the Secretary of the Interior, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, and pursuant to this Act, to States, political subdivisions, and instrumentalities thereof, and municipalities for use as a public park, public recreational area, or historic monument for the benefit of the public; or

(D) the Secretary of Defense, in the case of property transferred pursuant to the Surplus Property Act of 1944, as amended, to States, political subdivisions, and tax-supported instrumentalities thereof for use in the training and maintenance of civilian components of the armed forces,

is authorized and directed—

(i) to determine and enforce compliance with the terms, conditions, reservations, and restrictions contained in any instrument by which such transfer was made;

(ii) to reform, correct, or amend any such instrument by the execution of a corrective, reformative, or amendatory instrument where necessary to correct such instrument or to conform such transfer to the requirements of applicable law; and

(iii) to (I) grant releases from any of the terms, conditions, reservations, and restrictions contained in, and (II) convey, quitclaim, or release to the transferee or other eligible user any right or interest reserved to the United States by, any instrument by which such transfer was made, if he determines that the property so transferred no longer serves the purpose for which it was transferred, and that such release, conveyance, or quitclaim deed will not prevent accomplishment of the purpose for which such property was so transferred: *Provided*, That any such release, conveyance, or quitclaim deed may be granted on, or made subject to, such terms and conditions as he shall deem necesto protect or advance the interests of the United States.

(l) The Administrator is authorized to take possession of abandoned and other unclaimed property on premises owned or leased by the Government, to determine when title thereto vested in the United States, and to utilize, transfer or otherwise dispose of such property. Former owners of such property upon proper claim filed within three years from the date of vesting of title in the United States shall be paid the proceeds realized from the

disposition of such property or, if the property is used or transferred, the fair value therefor as of the time title was vested in the United States as determined by the Administrator, less in either case the costs incident to the care and handling of such property as determined by the Administrator.

PROCEEDS FROM TRANSFER OR DISPOSITION OF PROPERTY

SEC. 204. (a) All proceeds under this title from any transfer of excess property to a Federal agency for its use, or from any sale, lease, or other disposition of surplus property, shall be covered into the Treasury as miscellaneous receipts, except as provided in subsections (b), (c), (d), and (e) of this section.

(b) Where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts, then the net proceeds of the disposition or transfer shall be credited to the reimbursable fund or appropriation or paid to the Federal agency which determined such property to be excess: *Provided,* That the proceeds shall be credited to miscellaneous receipts in any case when the agency which determined the property to be excess shall deem it uneconomical or impractical to ascertain the amount of net proceeds. As used in this subsection, the term "net proceeds of the disposition or transfer" means the proceeds of the disposition or transfer minus all expenses incurred for care and handling and disposition or transfer.

(c) Any Federal agency disposing of surplus property under this title (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

(d) Where any contract entered into by an executive agency or any subcontract under such contract authorizes the proceeds of any sale of property in the custody of the contractor or subcontractor to be credited to the price or cost of the work covered by such contract or subcontract, the proceeds of any such sale shall be credited in accordance with the contract or subcontract.

(e) Any executive agency entitled to receive cash under any contract covering the lease, sale or other disposition of surplus property may in its discretion accept, in lieu of cash, any property determined by the Munitions Board to be strategic or critical material at the prevailing market price thereof at the time the cash payment or payments became or become due.

(f) Where credit has been extended in connection with any disposition of surplus property under this title or by War Assets Administration (or its predecessor agencies) under the Surplus Property Act of 1944, or where such disposition has been by lease or permit, the Administrator shall administer and manage such credit, lease, or permit, and any security therefor, and may enforce, adjust, and settle any right of the Government with respect thereto in such manner and upon such terms as he deems in the best interest of the Government.

POLICIES, REGULATIONS, AND DELEGATIONS

SEC. 205. (a) The President may prescribe such policies and directives, not inconsistent with the provisions

of this Act, as he shall deem necessary to effectuate the provisions of this Act, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder.

(b) The Comptroller General after considering the needs and requirements of the executive agencies shall prescribe principles and standards of accounting for property, cooperate with the Administrator and with the executive agencies in the development of property accounting systems, and approve such systems when deemed to be adequate and in conformity with prescribed principles and standards. From time to time the General Accounting Office shall examine such property accounting systems as are established by the executive agencies to determine the extent of compliance with prescribed principles and standards and approved systems, and the Comptroller General shall report to the Congress any failure to comply with such principles and standards or to adequately account for property.

(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this Act, and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations.

(d) The Administrator is authorized to delegate and to authorize successive redelegation of any authority transferred to or vested in him by this Act (except for the authority to issue regulations on matters of policy having application to executive agencies, the authority contained in section 106, and except as otherwise provided in this Act) to any official in the General Services Administration or to the head of any other Federal agency.

(e) With respect to any function transferred to or vested in the General Services Administration or the Administrator by this Act, the Administrator may (1) direct the undertaking of its performance by the General Services Administration or by any constituent organization therein which he may designate or establish; or (2) designate and authorize any executive agency to perform such function for itself; or (3) designate and authorize any other executive agency to perform such function; or (4) provide for such performance by any combination of the foregoing methods. Any designation or assignment of functions or delegation of authority to another executive agency under this section shall be made only with the consent of the executive agency concerned or upon direction of the President.

(f) When any executive agency (including the General Services Administration and constituent organizations thereof) is authorized and directed by the Administrator to carry out any function under this Act, the Administrator may, with the approval of the Director of the Bureau of the Budget, provide for the transfer of appropriate personnel, records, property, and allocated funds of the General Services Administration, or of such other executive agency as has theretofore carried out such function, to the executive agency so authorized and directed.

(g) The administrator may establish advisory committees to advise with him with respect to any function transferred to or vested in the Administrator by this Act. The members thereof shall serve without compensation but shall be entitled to transportation and not to exceed $25 per diem in lieu of subsistence, as authorized by section 5 of the Act of August 2, 1946 (5 U.S.C. 73b-2), for persons so serving.

(h) The Administrator shall advise and consult with interested Federal agencies with a view to obtaining their advice and assistance in carrying out the purposes of this title.

SURVEYS, STANDARDIZATION AND CATALOGING

SEC. 206. (a) As he may deem necessary for the effectuation of his functions under this title, and after adequate advance notice to the executive agencies affected, and with due regard to the requirements of the National Military Establishment as determined by the Secretary of Defense, the Administrator is authorized (1) to make surveys of Government property and property management practices and obtain reports thereon from executive agencies; (2) to cooperate with executive agencies in the establishment of reasonable inventory levels for property stocked by them and from time to time report any excessive stocking to the Congress and to the Director of the Bureau of the Budget; (3) to establish and maintain such uniform Federal supply catalog system as may be appropriate to identify and classify personal property under the control of Federal agencies: *Provided*, That the Administrator and the Secretary of Defense shall coordinate the cataloging activities of the General Services Administration and the National Military Establishment so as to avoid unnecessary duplication; and (4) to prescribe standardized forms and procedures, except such as the Comptroller General is authorized by law to prescribe, and standard purchase specifications.

(b) Each Federal agency shall utilize such uniform Federal supply catalog system and standard purchase specifications, except as the Administrator, taking into consideration efficiency, economy, and other interests of the Government, shall otherwise provide.

(c) The General Accounting Office shall audit all types of property accounts and transactions at such times and in such manner as determined by the Comptroller General. Such audit shall be conducted as far as practicable at the place or places where the property or records of the executive agencies are kept and shall include but not necessarily be limited to an evaluation of the effectiveness of internal controls and audits, and a general audit of the discharge of accountability for Government-owned or controlled property based upon generally accepted principles of auditing.

APPLICABILITY OF ANTITRUST LAWS

SEC. 207. Whenever any executive agency shall begin negotiations for the disposition to private interests of a plant or plants, or other property, which cost the Government $1,000,000 or more, or of patents, processes, techniques, or inventions, irrespective of cost, the executive agency shall promptly notify the Attorney General of the proposed disposal and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed sixty days after receiving such notification, the Attorney General shall advise the Administrator and the interested executive agency whether, insofar as he can determine, the proposed disposition would tend to create or maintain a situation inconsistent with the antitrust laws. Upon the request of the Attorney General, the Administrator or interested executive agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition or proposed disposition of surplus property violates the antitrust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their

application to persons who buy or otherwise acquire property under the provisions of this Act. As used in this section the term "antitrust laws" includes the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; and sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended.

EMPLOYMENT OF PERSONNEL

SEC. 208. (a) The Administrator is authorized, subject to the civil-service and classification laws, to appoint and fix the compensation of such personnel as may be necessary to carry out the provisions of titles I, II, III, and V of this Act.

(b) To such extent as he finds necessary to carry out the provisions of titles I, II, III, and V of this Act, the Administrator is hereby authorized to procure the temporary (not in excess of one year) or intermittent services of experts or consultants or organizations thereof, including stenographic reporting services, by contract or appointment, and in such cases such service shall be without regard to the civil-service and classification laws, and, except in the case of stenographic reporting services by organizations, without regard to section 3709, Revised Statutes, as amended (41 U.S.C. 5).

(c) Notwithstanding the provisions of section 1222 of the Revised Statutes (10 U. S. C. 576) or of any other provision of law, the Administrator in carrying out the functions imposed upon him by this Act is authorized to utilize in his agency the services of officials, officers, and other personnel in other executive agencies, including personnel of the armed services, with the consent of the head of the agency concerned.

CIVIL REMEDIES AND PENALTIES

SEC. 209. (a) Where any property is transferred or disposed of in accordance with this Act and any regulations prescribed hereunder, no officer or employee of the Government shall (1) be liable with respect to such transfer or disposition except for his own fraud, or (2) be accountable for the collection of any purchase price for such property which is determined to be uncollectible by the Federal agency responsible therefor.

(b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property hereunder—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall

retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

(c) The several district courts of the United States, the District Court of the United States for the District of Columbia, and the several district courts of the Territories and possessions of the United States, within whose jurisdictional limits the person, or persons, doing or committing such act, or any one of them, resides or shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit, and such person or persons as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct.

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

REPORTS TO CONGRESS

SEC. 210. The Administrator shall submit a report to the Congress, in January of each year and at such other times as he may deem it desirable, regarding the administration of his functions under this Act, together with such recommendations for amendments to this Act as he may deem appropriate as the result of the administration of such functions, at which time he shall also cite the laws becoming obsolete by reason of passage or operation of the provisions of this Act.

TITLE III—PROCUREMENT PROCEDURE

DECLARATION OF PURPOSE

SEC. 301. The purpose of this title is to facilitate the procurement of supplies and services.

APPLICATION AND PROCUREMENT METHODS

SEC. 302. (a) The provisions of this title shall be applicable to purchases and contracts for supplies or services made—

(1) by the General Services Administration for the use of such agency or otherwise; and

(2) by any other executive agency (except any agency named in section 2 (a) of the Armed Services Procurement Act of 1947), to the extent of and in conformity with authority delegated by the Administrator pursuant to the provisions of this subsection.

The Administrator may delegate to the head of any other such agency authority to make purchases and contracts for supplies or services pursuant to the provisions of this title (A) for the use of two or more executive agencies or (B) in other cases upon a determination by the Administrator that by reason of circumstances set forth in such determination such delegation is advantageous to the Government in terms of economy, efficiency, or national security. Notice of every such delegation of authority so made shall be furnished to the General Accounting Office.

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the au-

thority of paragraph (7) or (8) of section 302 (c) of this title, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 303, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000: *Provided,* That no agency other than the General Services Administration shall make any purchase of, or contract for, supplies or services in excess of $500 under this paragraph except in the exercise of authority conferred by the Administrator to procure and furnish supplies and services for the use of two or more executive agencies;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for supplies or services for which it is impracticable to secure competition;

(10) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided,* That beginning six months after the effective date of this title and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this paragraph (10) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(11) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(12) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in special situations or in particular localities in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(13) for supplies or services as to which the agency head determines that bid prices after advertising therefor are not reasonable (either as to all or as to some part of the requirements) or have not been independently arrived at in open competition:

Provided, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all or some of the bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder and (B) the negotiated price is the lowest negotiated price offered by any responsible supplier; or

(14) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 303, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (9), (10), (11), or (13) of subsection (c) of this section.

ADVERTISING REQUIREMENTS

SEC. 303. Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement

of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

REQUIREMENTS OF NEGOTIATED CONTRACTS

SEC. 304. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 302 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 302 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per

centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plans and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

ADVANCE PAYMENTS

SEC. 305. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract

price upon such terms as the parties shall agree: *Provided,* That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

WAIVER OF LIQUIDATED DAMAGES

SEC. 306. Whenever any contract made on behalf of the Government by the agency head or by officers authorized by him so to do includes a provision for liquidated damages for delay, the Comptroller General on the recommendation of the agency head is authorized and impowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

ADMINISTRATIVE DETERMINATIONS AND DELEGATIONS

SEC. 307. (a) The determinations and decisions provided in this title to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this title, includ-

ing the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (11) and (12) of section 302 (c) and in section 305 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (10) of section 302 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000. The power of the Administrator to make the delegations and determinations specified in section 302 (a) shall be delegable only to the Deputy Administrator or to the chief official of any principal organizational unit of the General Services Administration.

(c) Each determination or decision required by paragraphs (10), (11), (12), or (13) of section 302 (c), by section 304 or by section 305 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 302 (c), except in a case covered by paragraphs (2), (3), (4), (5), or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

STATUTES CONTINUED IN EFFECT

SEC. 308. No purchase or contract shall be exempt from the Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U. S. C. 35 to 45), or from the Act of March 3, 1931 (46 Stat. 1494, as amended; 40 U. S. C. 276a to 276a-6), solely by reason of having been entered into pursuant to section 302 (c) hereof without advertising, and the provisions of said Acts and of the Act of June 19, 1912 (37 Stat. 137, as amended; 40 U. S. C. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts.

DEFINITIONS

SEC. 309. As used in this title—

(a) The term "agency head" shall mean the head or any assistant head of any executive agency, and may at the option of the Administrator include the chief official of any principal organizational unit of the General Services Administration.

(b) The term "supplies" shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description (except the categories of naval vessels named in section 3 (d)), aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof.

STATUTES NOT APPLICABLE

SEC. 310. The following provisions of law shall not apply to the procurement of supplies or services (1) by the General Services Administration, or (2) within the scope of authority delegated by the Administrator to any other executive agency:

Revised Statutes, section 3709, as amended (41 U. S. C. 5);

Revised Statutes, section 3735 (41 U. S. C. 13);

Sections 1 and 2 of the Act of October 10, 1940 (54 Stat. 1109, as amended; 41 U. S. C. 6 and 6a).

TITLE IV—FOREIGN EXCESS PROPERTY

DISPOSAL OF FOREIGN EXCESS PROPERTY

SEC. 401. Each executive agency having foreign excess property shall be responsible for the disposal thereof: *Provided,* That (a) the head of each such executive agency shall, with respect to the disposition of such property, conform to the foreign policy of the United States; (b) the Secretary of State shall have the authority to use foreign currencies and credits acquired by the United States under section 402 (b) of this Act in order to effectuate the purposes of section 32 (b) (2) of the Surplus Property Act of 1944, as amended, and the Foreign Service Buildings Act of May 7, 1926, as amended (including Public Law 547, Seventy-ninth Congress (60 Stat. 663)), and for the purpose of paying any other governmental expenses payable in local currencies, and the authority to amend, modify, and renew agreements in effect on the effective date of this Act; (c) any foreign currencies or credits acquired by the Department of State pursuant to such agreements shall be administered in accordance with procedures that may from time to time be established by the Secretary of the Treasury and, if and when reduced to United States currency, shall be covered into the Treasury as miscellaneous receipts; and (d) the Department of State shall, except to such extent as the President shall otherwise determine, continue to perform other functions with respect to agreements for the disposal of foreign

excess property in effect on the effective date of this Act.

METHODS AND TERMS OF DISPOSAL

SEC. 402. Foreign excess property may be disposed of (a) by sale, exchange, lease, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the head of the executive agency concerned deems proper; but in no event shall any property be sold without a condition forbidding its importation into the United States, unless the Secretary of Agriculture (in the case of any agricultural commodity, food, or cotton or woolen goods) or the Secretary of Commerce (in the case of any other property) determines that the importation of such property would relieve domestic shortages or otherwise be beneficial to the economy of this country, or (b) for foreign currencies or credits, or substantial benefits or the discharge of claims resulting from the compromise or settlement of such claims by any executive agency in accordance with the law, whenever the head of the executive agency concerned determines that it is in the interest of the United States to do so. Such property may be disposed of without advertising when the head of the executive agency concerned finds so doing to be most practicable and to be advantageous to the Government. The head of each executive agency responsible for the disposal of foreign excess property may execute such documents for the transfer of title or other interest in property and take such other action as he deems necessary or proper to dispose of such property; and may authorize the abandonment, destruction, or donation of foreign excess property under his control which has no commercial value or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale.

PROCEEDS, FOREIGN CURRENCIES

SEC. 403. Proceeds from the sale, lease, or other disposition of foreign excess property, (a) shall, if in the form of foreign currencies or credits, be administered in accordance with procedures that may from time to time be established by the Secretary of the Treasury, and (b) shall, if in United States currency, or when any proceeds in foreign currencies or credits shall be reduced to United States currency, be covered into the Treasury as miscellaneous receipts: *Provided,* That the provisions of section 204 (b) (which by their terms apply to property disposed of under title II) shall be applicable to proceeds of foreign excess property disposed of for United States currency under this title IV: *And provided further,* That any executive agency disposing of foreign excess property under this title (1) may deposit, in a special account with the Treasurer of the United States, such amount of the proceeds of such dispositions as it deems necessary to permit appropriate refunds to purchasers when any disposition is rescinded or does not become final, or payments for breach of any warranty, and (2) may withdraw therefrom amounts so to be refunded or paid, without regard to the origin of the funds withdrawn.

MISCELLANEOUS PROVISIONS

SEC. 404. (a) The President may prescribe such policies, not inconsistent with the provisions of this title, as he shall deem necessary to effectuate the provisions of this title, which provisions shall guide each executive agency in carrying out its functions hereunder.

(b) Any authority conferred upon any executive agency or the head thereof by the provisions of this title may be delegated, and successive redelegation thereof may

be authorized, by such head to any official in such agency or to the head of any other executive agency.

(c) The head of each executive agency responsible for the disposal of foreign excess property hereunder may, as may be necessary to carry out his functions under this title, (1) subject to the civil-service and classification laws, appoint and fix the compensation of personnel, and (2) without regard to the civil-service and classification laws, appoint and fix the compensation of personnel outside the continental limits of the United States.

(d) The head of each executive agency responsible for the disposal of foreign excess property under this title shall submit a report to Congress in January of each year or at such other time or times as he may deem desirable relative to its activities under this title, together with any appropriate recommendations.

(e) There shall be transferred from the Department of State to each other executive agency affected by this title such records, property, personnel, obligations, commitments, and unexpended balances of appropriations, allocations, and other funds, available or to be made available, as the Director of the Bureau of the Budget shall determine to relate to functions of such agency under this title which have heretofore been administered by the Department of State.

TITLE V—GENERAL PROVISIONS

APPLICABILITY OF EXISTING PROCEDURES

SEC. 501. All policies, procedures, and directives prescribed—

(a) by either the Director, Bureau of Federal Supply, or the Secretary of the Treasury and relating

to any function transferred to or vested in the Administrator, by the provisions of this Act;

(b) by any officer of the Government under the authority of the Surplus Property Act of 1944, as amended, or under other authority with respect to surplus property or foreign excess property;

(c) by or under authority of the Federal Works Administrator or the head of any constituent agency of the Federal Works Agency; and

(d) by the Archivist of the United States or any other officer or body whose functions are transferred by title I of this Act,

in effect upon the effective date of this Act and not inconsistent herewith, shall remain in full force and effect unless and until superseded, or except as they may be amended, under the authority of this Act or under other appropriate authority.

REPEAL AND SAVING PROVISIONS

SEC. 502. (a) There are hereby repealed—

(1) the Surplus Property Act of 1944, as amended (except sections 13 (d), 13 (g), 13 (h), 28, and 32 (b) (2)), and sections 501 and 502 of Reorganization Plan Numbered 1 of 1947: *Provided*, That, with respect to the disposal under this Act of any surplus real estate, all priorities and preferences provided for in said Act, as amended, shall continue in effect until 12 o'clock noon (eastern standard time), December 31, 1949;

(2) that portion of the Act entitled "An Act making supplemental appropriations for the Executive Office and sundry independent executive bureaus,

boards, commissions, and offices, for the fiscal year ending June 30, 1949, and for other purposes", approved June 30, 1948 (Public Law 862, Eightieth Congress), as amended, appearing under the caption "Surplus property disposal";

(3) the Act entitled "An Act to authorize the Secretary of War to dispose of material no longer needed by the Army", approved February 28, 1936 (49 Stat. 1147; 10 U. S. C. 1258);

(4) the Act entitled "An Act to authorize the Secretary of the Navy to dispose of material no longer needed by the Navy", approved May 23, 1930, as amended (46 Stat. 378; 34 U. S. C. 546c);

(5) section 5 of the Act of July 11, 1919 (41 Stat. 67; 40 U. S. C. 311);

(6) the first and second provisos contained in the fifth paragraph under the heading "Division of Supply" in section 1 of the Act of December 20, 1928 (45 Stat. 1030; 40 U. S. C. 311a);

(7) the Act entitled "An Act to authorize the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force to donate excess and surplus property for educational purposes", approved July 2, 1948 (Public Law 889, Eightieth Congress);

(8) section 203 of the Act of June 26, 1943 (57 Stat. 195, as amended; 5 U. S. C. 118d-1);

(9) the Act of April 15, 1937 (50 Stat. 64; 5 U. S. C. 118d);

(10) the second proviso contained in the paragraph of the Act of August 10, 1912 (37 Stat. 296;

5 U. S. C. 545), headed "Contingent expenses, Department of Agriculture";

(11) the second proviso contained in the twentieth paragraph of section 1 of the Act of March 2, 1917 (39 Stat. 973; 5 U. S. C. 494);

(12) the twenty-sixth paragraph under the heading "National Parks" of the Act of January 24, 1923 (42 Stat. 1215; 16 U. S. C. 9);

(13) the fifth paragraph under the heading "Experiments and demonstrations in livestock production in the cane-sugar and cotton districts of the United States" of the Act of June 30, 1914 (38 Stat. 441; 5 U. S. C. 546);

(14) the proviso contained in the second paragraph under the heading "Library, Department of Agriculture" of the Act of March 4, 1915 (38 Stat. 1107; 5 U. S. C. 548);

(15) the second proviso contained in the second paragraph under the heading "Clothing and camp and garrison equipage" of section 1 of the Act of August 29, 1916 (39 Stat. 635; 10 U. S. C. 1271);

(16) the Act of May 11, 1939 (53 Stat. 739; 10 U. S. C. 1271a);

(17) the fifth paragraph under the heading "Office of the Chief Signal Officer" of the Act of May 12, 1917 (40 Stat. 43, as amended; 10 U. S. C. 1272);

(18) the third proviso contained in the second paragraph under the heading "Office of the Chief Signal Officer" of the Act of March 4, 1915 (38 Stat. 1064; 10 U. S. C. 1273);

(19) the fourteenth paragraph under the heading "Smithsonian Institution" of section 1 of the Act of March 3, 1915 (38 Stat. 839; 20 U. S. C. 66);

(20) the second paragraph under the heading "Government hospital for the insane" of section 1 of the Act of August 1, 1914 (38 Stat. 649; 24 U. S. C. 173);

(21) the second paragraph under the heading "Saint Elizabeths Hospital" of section 1 of the Act of June 12, 1917 (40 Stat. 153; 24 U. S. C. 174);

(22) the proviso contained in the second paragraph under the heading "Bureau of Supplies and Accounts" of the Act of August 22, 1912 (37 Stat. 346; 34 U. S. C. 531a);

(23) the second proviso of the first paragraph under the heading "Bureau of Yards and Docks" of the Act of August 29, 1916 (34 U. S. C. 532);

(24) the proviso contained in the second paragraph under the heading "Maintenance, Quartermaster's Department, Marine Corps" of the Act of March 4, 1917 (39 Stat. 1189; 34 U. S. C. 723);

(25) the twentieth paragraph under the heading "Bureau of Mines" of section 1 of the Act of July 19, 1919 (41 Stat. 200; 40 U. S. C. 118);

(26) the first sentence of section 5 of the Act of March 4, 1915 (38 Stat. 1161; 41 U. S. C. 26);

(27) the third paragraph under the heading "Interstate Commerce Commission" of section 1 of the Act of August 1, 1914 (38 Stat. 627; 49 U. S. C. 58);

(28) the Act of June 6, 1941 (55 Stat. 247; 14 U. S. C. 31b);

(29) section 4 of the Act of June 17, 1910 (36 Stat. 531; 41 U. S. C. 7);

(30) the Act of February 27, 1929 (45 Stat. 1341; 41 U. S. C. 7a, 7b, 7c, and 7d); and

(31) section 1 of the Act of May 14, 1935 (49 Stat. 234; 41 U. S. C. 7c-1).

(b) The provisions of the first, third, and fifth paragraphs of section 1 of Executive Order Numbered 6166 of June 10, 1933, are hereby superseded, insofar as they relate to any function now administered by the Bureau of Federal Supply except functions with respect to standard contract forms.

(c) The authority conferred by this Act is in addition to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith, except that sections 205 (b) and 206 (c) of this Act shall not be applicable to any Government corporation or agency which is subject to the Government Corporation Control Act (59 Stat. 597; 31 U. S. C. 841).

(d) Nothing in this Act shall impair or affect any authority of—

(1) the President under the Philippine Property Act of 1946 (60 Stat. 418; 22 U. S. C. 1381);

(2) any executive agency with respect to any phase (including, but not limited to, procurement, storage, transportation, processing, and disposal) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments, or foreign aid, relief, or rehabilitation: *Provided*, That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program

and the effective and efficient conduct of its business, coordinate its operations with the requirements of this Act and the policies and regulations prescribed pursuant thereto;

(3) any executive agency named in the Armed Services Procurement Act of 1947, and the head thereof, with respect to the administration of said Act;

(4) the National Military Establishment with respect to property required for or located in occupied territories;

(5) the Secretary of Defense with respect to the administration of the National Industrial Reserve Act of 1948;

(6) the Secretary of Defense, the Munitions Board, and the Secretaries of the Army, Navy, and Air Force with respect to the administration of the Strategic and Critical Materials Stock Piling Act (60 Stat. 596), and provided that any imported materials which the authorized procuring agency shall certify to the Commissioner of Customs to be strategic and critical materials procured under said Act may be entered, or withdrawn from warehouse, free of duty;

(7) the Secretary of State under the Foreign Service Buildings Act of May 7, 1926, as amended;

(8) the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force with respect to the administration of section 1 (b) of the Act entitled "An Act to expedite the strengthening of the national defense", approved July 2, 1940 (54 Stat. 712);

(9) the Secretary of Agriculture or the Department of Agriculture under (A) the National School

Lunch Act (60 Stat. 230); (B) the Farmers Home Administration Act of 1946 (60 Stat. 1062); (C) the Act of August 31, 1947, Public Law 298, Eightieth Congress, with respect to the disposal of labor supply centers, and labor homes, labor camps, or facilities; (D) section 32 of the Act of August 24, 1935 (49 Stat. 774), as amended, with respect to the exportation and domestic consumption of agricultural products; or (E) section 201 of the Agricultural Adjustment Act of 1938 (52 Stat. 36) or section 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1082);

(10) the Secretary of Agriculture, Farm Credit Administration, or any farm credit board under section 6 (b) of the Farm Credit Act of 1937 (50 Stat. 706), with respect to the acquisition or disposal of property;

(11) the Housing and Home Finance Agency, or any officer or constituent agency therein, with respect to the disposal of residential property, or of other property (real or personal) held as part of or acquired for or in connection with residential property, or in connection with the insurance of mortgages, loans, or savings and loan accounts under the National Housing Act;

(12) the Tennessee Valley Authority with respect to nonpersonal services, with respect to the matters referred to in section 201 (a) (4), and with respect to any property acquired or to be acquired for or in connection with any program of processing, manufacture, production, or force account construction: *Provided*, That the Tennessee Valley Authority shall to the maximum extent that it may deem practicable, consistent with the fulfillment of the purpose of its program and the effective and efficient conduct of

its business, coordinate its operations with the requirements of this Act and the policies and regulations prescribed pursuant thereto;

(13) the Atomic Energy Commission;

(14) the Administrator of Civil Aeronautics or the Chief of the Weather Bureau with respect to the disposal of airport property and airway property for use as such property. For the purpose of this paragraph the terms "airport property" and "airway property" shall have the respective meanings ascribed to them in the International Aviation Facilities Act (62 Stat. 450);

(15) the Postmaster General or the Postal Establishment with respect to the means and methods of distribution and transportation of the mails, and contracts, negotiations, and proceedings before Federal and State regulatory and rate-making bodies, relating to the transportation of the mails;

(16) the United States Maritime Commission with respect to the construction, reconstruction, and reconditioning (including outfitting and equipping incident to the foregoing), the acquisition, procurement, operation, maintenance, preservation, sale, lease, or charter of any merchant vessel or of any shipyard, ship site, terminal, pier, dock, warehouse, or other installation necessary or appropriate for the carrying out of any program of such Commission authorized by law, or nonadministrative activities incidental thereto: *Provided*, That the United States Maritime Commission shall to the maximum extent that it may deem practicable, consistent with the fulfillment of the purposes of such programs and the effective and efficient conduct of such activities, coordinate its op-

erations with the requirements of this Act, and the policies and regulations prescribed pursuant thereto;

(17) Central Intelligence Agency;

(18) except as provided in subsections (a) and (b) hereof, any other law relating to the procurement, utilization, or disposal of property: *Provided*, That, subject to, and within the scope of authority conferred on the Administrator by other provisions of this Act, he is authorized to prescribe regulations to govern any procurement, utilization, or disposal of property under any such law, whenever but only to the extent he deems such action necessary to effectuate the provisions of title II; nor

(19) for such period of time as the President may specify, any other authority of any executive agency which the President determines within one year after the effective date of this Act should, in the public interest, stand unimpaired by this Act.

(e) Section 3709, Revised Statutes, as amended (41 U. S. C. 5), is amended by striking out "$100" wherever it appears therein and inserting in lieu thereof "$500".

AUTHORIZATIONS FOR APPROPRIATIONS AND TRANSFER AUTHORITY

SEC. 503. (a) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

(b) When authorized by the Director of the Bureau of the Budget, any Federal agency may use, for the disposition of property under this Act, and for its care and handling pending such disposition, any funds heretofore or hereafter appropriated, allocated, or available to it for

purposes similar to those provided for in sections 201, 202, 203, and 205 of this Act.

SEPARABILITY

SEC. 504. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

EFFECTIVE DATE

SEC. 505. This Act shall become effective on July 1, 1949, except that the provisions of section 502 (a) (2) (repealing prior law relating to the disposition of the affairs of the War Assets Administration) shall become effective on June 30, 1949.

Approved June 30, 1949.